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THE ADDRESSES CONTAINED IN THIS BOOK WERE DELIVERED IN THE WILLIAM L. STORRS LECTURE SERIES, 1916, BEFORE THE LAW SCHOOL OF YALE UNIVERSITY, NEW HAVEN, CONNECTICUT.

INTRODUCTION

THE following pages contain substantially the five lectures delivered by the author in the Storrs Lecture Course in the Law School of Yale University, in February, 1916. The title given to this book, "Woman's Suffrage by Constitutional Amendment," is not the same under which the lectures were originally given. Their title was "Local Self-Government."

The reader will see that the real discussion in these pages is devoted to the proper and rightful demarcation of the powers of the Federal and State Governments under the Constitution of the United States, and the necessity for maintaining those powers in a just equilibrium for the preservation of the liberty of American citizens.

The proposed amendment to the Constitution, providing for woman's suffrage, is treated as one of the attempts to break down that

equilibrium, and it is here used as the "awful example" of such a breach in the relation of our governmental powers — State and Federal — to each other. On the same principle that a man once taken up on the streets of the city of Washington for drunkenness, who was carried to the police station, and on being examined before the officer was asked his business. He replied, "I am a Temperance Lecturer." Somewhat surprised, the officer asked for an explanation of his condition so inconsistent with his profession. He answered, "My brother and I go around together. He does the lecturing for temperance, and points to me as the 'awful example.'" This subject is in a small compass, but it is hoped that the effort to simplify the meaning and the philosophy of local self-government may serve to stimulate in the minds of those who read these pages the importance of maintaining that doctrine which gives to the American citizen the greatest power and the greatest opportunities for individual liberty.

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WOMAN'S SUFFRAGE
BY CONSTITUTIONAL AMENDMENT

WOMAN'S SUFFRAGE

BY

CONSTITUTIONAL AMENDMENT

CHAPTER I

SUFFRAGE DERIVED FROM THE STATES

THE right of woman to vote — if there be such a thing as the right of suffrage in any one — and the arguments with which such right or privilege is presented, constitute a most interesting phase of modern political discussion. My object in these pages is not to intrude upon that question, however interesting it may be, and however important it may be to the future of our country; but without touching the subject of the claim of woman to suffrage, and without expressing any opinion on the subject, to show that the attempt to bring about the right of suffrage for women by an amendment to the Constitution of the United States is opposed to the genius of the

instrument itself, and subversive of one of the most important principles incorporated in it. The right of woman to vote and her appeal to the public conscience in the assertion of her claim, however it may be deprecated by some, even when not militant, has at least the virtue of an appeal to the reason and conscience of the country, and should receive the calm consideration of those to whom the appeal is made.

That Idaho, California, Montana, and other States may have yielded to the claim of woman to this right, may be of little concern to the people of Maine, Massachusetts, and New York, for they have the like right to determine the question for themselves; but if Maine, Massachusetts, and New York, refusing to follow the lead of those States which have found it expedient and best to adopt this measure, decline to adopt it for themselves, believing that it may be inexpedient for them, they should be accorded the same respect and the same right to decline to adopt a system which they deem inexpedient as is accorded their sister States in their acceptance of the principle. Maine,

under our system of government, has no interest whatsoever in the right of suffrage which may be prescribed by the State of California for her people. Her State government is distinct and separate from that of California. Her social, political, and ethnic conditions may be as different from those of California as the climatic differences which prevail in these two States. And when Maine by authority of our Constitution is debarred the right of interfering with California in this respect, it should be recognized that such prohibition is reciprocal, and that California, exercising her inherent right to determine this question for herself, has no right to impose her conclusions upon her unwilling sister. California has a right to claim exemption from the interference of Maine or any of her sister States in granting the exercise of suffrage to those whom she may see fit to admit to that right, and any attempt to interfere with that right on the part of any other State is an intrusion which can be neither defended nor approved. In short, each State in the federal Union has been granted by the United States

Constitution the single and exclusive right of determining this question for itself, and if no one of the States may interfere with any other in the determination of this question, it is seriously to be doubted whether three-fourths of the States, by a violation of this basic principle, would be acting wisely to force upon any unwilling State the acceptance of a doctrine which that State may believe to be subversive of good government. For three-fourths of the States to attempt to compel the other one-fourth of the States of the Union, by constitutional amendment, to adopt a principle of suffrage believed to be inimical to their institutions, because they may believe it to be of advantage to themselves and righteous as a general doctrine, would be to accomplish their end by subverting a principle which has been recognized from the adoption of the Constitution of the United States to this day, viz., that the right of suffrage — more properly the privilege of suffrage — is a State privilege, emanating from the State, granted by the State, and that can be curtailed alone by the State.

And so, under the original Constitution, the right of suffrage abides in the State as one of the corner-stones of this imposing structure; and while under Article V when two-thirds of both Houses of Congress shall have proposed amendments to the Constitution and those amendments shall have been ratified by three-fourths of the States, the Constitution may be changed thereby, yet an amendment taking the right of determining suffrage and placing it under the control of the Federal Government would be a radical change of the instrument and contrary to the views of those who originally framed the Constitution. This provision has been accepted during the life of the Government for one hundred and twenty-six years without any serious denial of its wisdom, or any attempt to change its wise and beneficent provisions.

Should the proposed amendment to the Constitution denying the right of the States to deny suffrage to women because of sex be adopted, the following provisions of the Constitution of the .United States would be affected directly:

ARTICLE I, *Section* 2, C. U. S.:

"The House of Representatives shall be composed of members chosen every second year by the people of the several States, *and the electors of each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.*"

The Fifteenth Amendment to the Constitution, as follows:

Section 1. "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude."

Section 2. "The Congress shall have power to enforce this article by appropriate legislation."

ARTICLE II, *Section* 2 of the Constitution, as follows:

"Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and representatives, to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit, under the United States, shall be appointed an Elector."

The Seventeenth Amendment to the Constitution, which provides for the election of Senators by the people, as follows:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six years, and each Senator shall have one vote. The Electors in each State shall have the qualifications required for the most numerous branch of the State Legislatures."

Another section which has reference to *the exercise* of the right of suffrage, but not to its original grant, is ARTICLE I, *Section* 2, which would be indirectly affected by the proposed amendment. It is as follows:

"The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

Article I, Section 2, above quoted, is simple and clear. Since the Government of the United States must proceed, and can proceed only with officers elected to carry on its functions, this clause simply declares that members of the House of Representatives are to be elected every two years, and that those qualified to

vote for them shall be the same persons that each State in the federal Union has declared are entitled to vote for members of the most numerous branch of their State Legislature. The conditions of suffrage — positive and fixed — the Federal Convention could, of course, have prescribed. The thirteen original States, sitting in Convention, determining their future status, could have given up to the federal government the right, the power, and the duty to prescribe a uniform and unconditional qualification for suffrage for members of the House of Representatives. Indeed it would have been easy and simple, had they so desired, to have had this clause read, "The House of Representatives shall be composed of members chosen every second year by the people of the several states *who shall have the qualifications as prescribed by the Congress of the United States.*" Or instead of the latter clause, it might have read, "who shall possess fifty acres of land or $500.00 worth of property, real or personal." Indeed they could have adopted any fixed conditions of suffrage approved by their judgment as a

part of the Constitution, or could have left the terms and conditions to be determined from time to time by Congress. Such provisions the Convention could undoubtedly have adopted. That the lawmaking part of a government should be chosen by electors designated by *that* government, would certainly not have been inappropriate. But this initial step at the threshold of the Constitution itself shows, with great clearness, the purposes of those who were framing the instrument. If each State was to be represented in Congress by men of its own choice, the framers believed that no Electorate could so efficiently secure proper representation from each State as that which the States might select to elect the most numerous branch of their own legislatures.

It is of interest to note how this matter was considered in the original plans and resolutions offered to the Federal convention by Edmund Randolph, Charles Pinckney, William Patterson, and Alexander Hamilton.

In Mr. Randolph's resolutions offered to the convention, ARTICLE IV was as follows:

"Resolved, That the members of the first branch of the national legislature ought to be elected *by the people* of the several States, every ..... for the term of ..... to be of the age of ..... years at least, etc." [1]

Under Mr. Pinckney's plan, ARTICLE III was as follows:

"The members of the house of delegates shall be chosen every ..... year *by the people of the several States:* [2] and *the qualifications of the electors shall be the same as those of the electors in the several States for their legislatures.*" [3]

Under Mr. Patterson's plan, there seems to have been no suggestion as to how the elections to the House of Representatives were to be had.

Under Mr. Hamilton's plan, ARTICLE II was as follows:

"The assembly to consist of persons elected by the people, to serve for three years." [4]

On the 31st of May, 1787, when the Convention was considering the several plans, the

[1] Journal of Federal Convention, p. 67.
[2] Author's italics.
[3] *Id.*, pp. 71, 72.
[4] *Id.*, p. 130.

following resolution was submitted by Mr. Randolph:

"Resolved, That the members of the first branch of the national legislature ought to be elected *by the people of the several States.*" [1]

This was adopted by a vote of six States to two. Massachusetts, New York, Pennsylvania, Virginia, North Carolina, and Georgia voted in the affirmative, New Jersey and South Carolina in the negative, and Connecticut and Delaware were divided.[2]

On June 6 it was moved by Mr. Charles Pinckney, seconded by Mr. Rutledge, to strike the word "people" out of the fourth resolution submitted by Mr. Randolph, and to insert in its place the word "legislature," so as to read,

"Resolved, That the members of the first branch of the national legislature ought to be elected *by the legislatures* of the several states."

On this resolution Connecticut, New Jersey, and South Carolina voted yea. Massachusetts, New York, Pennsylvania, Delaware, Maryland,

[1] Author's italics.

[2] *Id.*, pp. 85, 86.

Virginia, North Carolina, and Georgia voted nay.[1]

Again, on June 21, a resolution by Gen. C. C. Pinckney was read:

"Resolved, That the members of the first branch of the legislature ought to be appointed in such manner as the legislature of each state shall direct."

On which resolution Connecticut, New Jersey, Delaware, South Carolina, voted yea, while Massachusetts, New York, Pennsylvania, Virginia, North Carolina, and Georgia voted nay, with Maryland divided.[2]

When the draft of the Constitution was reported by the committee of five, August 6, 1787, to the Convention, ARTICLE IV, *Section* 1, provided:

"The members of the house of representatives shall be chosen every second year by the people of the several states comprehended in this union. The qualifications of electors shall be the same, from time to time, as those of the electors in the several states of the most numerous branch of their own legislature."[3]

[1] Author's italics, pp. 103, 104.
[2] *Id.*, p. 140.
[3] *Id.*, p. 216.

On August 7, 1787, Mr. Gouverneur Morris moved to strike out the last clause in the first section of the fourth Article, beginning "The Qualifications of the electors," etc., on which Delaware alone voted yea, while New Hampshire, Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, and South Carolina voted nay, and Maryland divided.[1]

The discussion of Mr. Morris' motion was most interesting, showing a wide divergence in the original views of some of the members of the Convention on the question of suffrage. It is in part as follows:

"MR. WILSON. This part of the report was well considered by the committee, and he did not think it could be changed for the better. Unnecessary innovations he thought too should be avoided. It would be very hard and disagreeable for the same persons, at the same time, to vote for representatives in the state legislatures and to be excluded from a vote for those in the national legislature.

"MR. GOUVERNEUR MORRIS. Such a hardship would be neither great nor novel. The people are accustomed to it and not dissatisfied with it, in

[1] Author's italics, p. 222.

several of the States. In some of the States the qualifications are different for the choice of the Governor and Representatives; in others for different Houses of the Legislature. Another objection against the clause as it stands makes the qualifications of the national legislature depend on the will of the States, which he thought not proper.

"MR. ELSWORTH thought the qualifications of the electors stood on the most proper footing. The right of suffrage was a tender point and strongly guarded by most of the state Constitutions. The people will not readily subscribe to the National Constitution, if it should subject them to be disfranchised. The States are the best judges of the circumstances and temper of their own people.

"COL. MASON. The force of habit is certainly not attended to by those gentlemen who wish for innovations on this point. Eight or nine States have extended the right of suffrage beyond the freeholders. What will the people there say, if they should be disfranchised. A power to alter the qualifications would be a dangerous power in the hands of the Legislature [meaning Congress].

"MR. BUTLER. There is no right of which the people are more jealous than that of suffrage. Abridgments of it tend to the same revolution as in Holland,

where they have at length thrown all power into the hands of the senates, who fill up vacancies themselves, and form a rank aristocracy.

"MR. DICKINSON had a very different idea of the tendency of vesting the right of suffrage in the freeholders of the country. He considered them as the best guardians of liberty; and the restrictions of the right to them as a necessary defense against the dangerous influence of those multitudes without property and without principle, with which our country like all others will in time abound. As to the unpopularity of the innovation, it was in his opinion chimerical. The great mass of our citizens is composed at this time of freeholders, and will be pleased with it.

"MR. ELSWORTH. How shall the freehold be defined? Ought not every man who pays a tax to vote for the representative who is to levy and dispose of his money? Shall the wealthy merchants and manufacturers, who will bear a full share of the public burdens, be now allowed a voice in the imposition of them? Taxation and representation ought to go together.

"MR. GOUVERNEUR MORRIS. He had long learned not to be the dupe of words. The sound of aristocracy, therefore, had no effect upon him. It was the thing, not the name, to which he was opposed,

and one of his principal objections to the Constitution as it is now before us, is that it threatens the country with an aristocracy. The aristocracy will grow out of the House of Representatives. Give the votes to people who have no property and they will sell them to the rich who will be able to buy them. We should not confine our attention to the present moment. The time is not distant when this country will abound with mechanics and manufacturers who will receive their bread from their employers. Will such men be the secure and faithful guardians of liberty? Will they be the impregnable barrier against aristocracy? He was as little duped by the association of the words, 'Taxation and representation' — the man who does not give his vote freely is not represented. It is the man who dictates the vote. Children do not vote. Why? Because they want prudence. Because they have no will of their own. The ignorant and the dependent can be as little trusted with the public interest. He did not conceive the difficulty of defining 'freeholders' to be insuperable, still less that the restriction could be unpopular. Nine-tenths of the people are at present freeholders and these will certainly be pleased with it. As to merchants, etc., if they have wealth and value the right they can acquire it. If not, they don't deserve it.

"COL. MASON. We all feel too strongly the remains of ancient prejudices and view things too much through a British medium. A freehold is the qualification in England, and hence it is imagined to be the only proper one. The true idea in his opinion was that every man having evidence of attachment to and permanent common interest with the society ought to share in all its rights and privileges. Was this qualification restrained to freeholders? Does no other kind of property but land evidence a common interest in the proprietor? Does nothing besides property mark a permanent attachment? Ought the merchant, the monied man, the parent of a number of children whose fortunes are to be pursued in his own country be viewed as suspicious characters, and unworthy to be trusted with the common rights of their fellow citizens?

"MR. MADISON. The right of suffrage is certainly one of the fundamental articles of republican government, and ought not to be left to be regulated by the legislature. A gradual abridgment of this right has been the mode in which aristocracies have been built on the ruins of popular forms. Whether the constitutional qualification ought to be a freehold, would with him depend much on the probable reception such a change would meet with in the States where the right was now exercised by every

description of people. In several of the States a freehold was now the qualification. Viewing the subject on its merits alone, the freeholders of the country would be the safest depositories of republican liberty. In future times a great majority of the people will not only be without land, but any other sort of property. These will either combine under the influence of their common situation; in which case the rights of property and the public liberty will not be secure in their hands; or, which is more probable, they will become the tools of opulence and ambition, in which case there will be equal danger on another side. The example of England has been misconceived. A very small portion of the representatives are there chosen by freeholders. The greatest part are chosen by the cities and boroughs, in many of which the qualification of suffrage is as low as it is in any one of the United States, and it was in the boroughs and cities, rather than the counties, that bribery most prevailed, and the influence of the crown on elections was most dangerously exerted."[1]

These references to the Federal Convention which framed the Constitution show that

[1] Documentary History of the Constitution (1786–1870), Vol. III, pp. 464, 465, 466, 467, 468.

among the plans brought to the Convention for adoption, all except Patterson's (that suggested no plan for the selection of representatives) suggested the election of representatives by the people. How else could they be elected? Could a republic have been founded on a less stable foundation than that? Nor is it surprising that the people of the several States were to elect the representatives of the government which was being organized. But it is of interest to find that of the plans submitted to the Federal Convention by Randolph, Pinckney, Patterson, and Hamilton, that Pinckney suggested the plan finally adopted (adopting almost without change the language itself of his plan), namely, that the electors of the House of Representatives were to be the electors that the States had selected as proper and suitable to elect the most numerous branch of their State Legislatures. This fact is significant in showing that from one of those who were elected to the Convention, and who had been giving this subject careful study, with due regard and consideration for the prevailing views of the people,

there was brought to the Convention and submitted as a basis for their consideration a plan that so fully met the views of all the States except Delaware — Maryland being divided (August 7). An examination of the proceedings of the Convention, involving the adoption of many of its most important provisions, will show few if any propositions of importance that received the assent of so large a majority of the members. Pinckney before the meeting of the Convention had caught the spirit of the people and formulated it in Article IV, and the ratification by the Convention of this article, by such a majority, showed that all the members were equally conversant with the public opinion of the people of the States on this subject.

These discussions in the Federal Convention, while showing a diversity of views as to who should enjoy the privilege of suffrage — whether freehold or manhood suffrage should prevail — failed to disclose any expression of sentiment for placing this right in any other hands than those of the States. Indeed, with remarkable

unanimity unequaled in the progress of the Convention on any other subject, was there a consensus of opinion that the States were to be the authors of this right or privilege. And so strong was the feeling among the States that the electorate should in no way be controlled by any other power than that of the States themselves, that even though the Constitution had, in their judgment, contained innumerable blessings to the people of the country, it may well be doubted whether they would ever have accepted it had this sacred right been confided to the hands of the Federal Government rather than to the States. It was recognized as a right largely dependent upon local conditions for its proper exercise, and these conditions varied in different localities, and therefore it was regarded that the Federal Government was neither the proper nor the suitable repository of such power.

Article II, Section 2, above quoted, relates to Presidential Electors, who, by their votes in the Electoral College, elect the President of the United States; and by this section the mode of appointment is left to the Legislatures

of each State. They can direct their appointments in such manner as they may see fit, but in most, if not all, of the States to-day these Electors, by the direction of the Legislatures of the several States, are chosen by the people of the States, so, should the proposed amendment for woman suffrage be adopted, the women would be permitted in all of the States to vote for such Presidential Electors.

An examination of the Seventeenth Amendment to the Constitution, recently adopted, shows that after one hundred and twenty-three years of life of the Government, it was deemed desirable to change the mode of electing United States Senators. It was not an organic change in the Constitution, for the Senators to-day represent the States just as they did when they were elected by the Legislatures of the States; indeed they more strongly represent the sovereignty of the States, since they are now elected by the only sovereign power of the States. But it is of peculiar interest to see that in the change that was made, the Congress of the United States which pro-

posed the amendment, and the States which ratified it, saw no reason to change the location of the right of suffrage from the States to the Federal Government, but adhered to the original form by declaring "The Electors in each State shall have the qualifications required for the most numerous branch of the State Legislatures."

The proposed suffrage amendment for women, therefore, comes as a distinct challenge to the provisions of the original Constitution, and the *onus* is on its propounders to show that that provision was wrong, inadequate, and insufficient; and when such proof is offered, it will be met by this striking fact, that Congress in passing the Seventeenth Amendment, and the States in ratifying it, found no reason to change the original Constitution, but reaffirmed it in practically the exact language of the original Constitution, after one hundred and twenty-three years of experience under its provisions.

So that, if the proposed amendment for woman suffrage is adopted, women would be allowed to vote not only in State elections for

members of the most numerous branch of the State Legislatures, and other state and municipal officers, but their rights would be enlarged to vote for Representatives and Senators in Congress and Presidential Electors.

As confirming the view that the Convention intended to leave the question of suffrage entirely with the States, free from the interference of the Federal Government, the views of Mr. Madison as set forth in the fifty-second number of the *Federalist* may be quoted with interest. He said:

"Those of the former are to be the same with those of the electors of the most numerous branch of the State Legislatures. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the Convention, therefore to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress would have been improper, for the reason just mentioned. To have submitted it to the legislative discretion of the States would have been improper for the same reason; and for the additional reason that it would have rendered too dependent

on the State Governments that branch of the Federal Government which ought to be dependent on the people alone. To have reduced the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the Convention. The provision made by the Convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established, or which may be established by the State itself. It will be safe to the United States, because, being fixed by the State Constitutions, it is not alterable by the State Governments, and it cannot be feared that the people of the States will alter this part of their constitutions in such a manner as to abridge the rights secured to them by the Federal Constitution." [1]

In the Convention called by the State of New York to ratify the Constitution, Alexander Hamilton also used this remarkable language:

"Were the laws of the Union to new-model the internal policy of any State; were they to alter or abrogate at a blow the whole of its civil and criminal institutions; were they to penetrate the recesses of

[1] *The Federalist*, No. 52, by Paul L. Ford, p. 342.

domestic life and control in all respects the private conduct of individuals, there might be more force in the objection; and the same Constitution which was happily calculated for one State, might sacrifice the welfare of another."

Oliver Wolcott, as a member of the Connecticut Convention to consider the Federal Constitution, said:

"The Constitution effectually secures the States in their several rights. It must secure them for its own sake, for they are the pillars which uphold the general system."

Of course no defender of the doctrine of local self-government can fail to remember the words of the great Chief Justice in the case of *M'Culloch* v. *State of Maryland:*[1]

"No political dreamer was ever wild enough to think of breaking down the lines which separate the States and of compounding the American people into one common mass."

To the same effect, are the views of Judge Cooley, who says:

"The whole subject of the regulation of elections, including the prescribing of qualifications for suf-

[1] 4 Wheaton, 316.

frage, is left by the national constitution to the several States, except as it is provided by that instrument that the electors for representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State legislature, and as the fifteenth amendment forbids denying to citizens the right to vote on account of race, color, or previous condition of servitude. Participation in the elective franchise is a privilege rather than a right, and it is granted or denied on grounds of general policy; the prevailing view being that it should be as general as possible consistent with the public safety. Aliens are generally excluded, though in some States they are allowed to vote after residence for a specified period, provided they have declared their intention to become citizens in the manner prescribed by law. The fifteenth amendment, it will be seen, does not forbid denying the franchise to citizens except upon certain specified grounds, and it is matter of public history that its purpose was to prevent discriminations in this regard as against persons of African descent." [1]

Judge Story, in his explanation of this provision, is quite elaborate and full, and deserves special notice. He says:

[1] Cooley's *Constitutional Limitations*, p. 901.

"In the American colonies, under their charters and laws, no uniform rules in regard to the right of suffrage existed. In some of the colonies the course of the parent country was closely followed, so that freeholders alone were voters; in others a very near approach was made to universal suffrage among the males of competent age; and in others, again, a middle principle was adopted which made taxation and voting dependent upon each other, or annexed to it the qualification of holding some personal estate, or the privilege of being a freeman, or the eldest son of a freeholder of the town or corporation. When the revolution brought about the separation of the colonies, and they formed themselves into independent states, a very striking diversity was observable in the original Constitutions adopted by them; and a like diversity has pervaded all the Constitutions of the new States, which have since grown up, and all the revised Constitutions of the old states, which have received the final ratification of the people. In some of the states the right of suffrage depends upon a certain length of residence, and payment of taxes; in others, upon mere citizenship and residence; in others, upon the possession of a freehold, or some estate, of a particular value, or upon the payment of taxes, or performance of some public duty, such as service in the militia, or on the highways. In no

two of these state constitutions will it be found that the qualifications of the voters are settled upon the same uniform basis. So that we have the most abundant proofs, that among a free and enlightened people, convened for the purpose of establishing their own forms of government, and the rights of their own voters, the question as to the due regulation of the qualifications has been deemed a matter of mere state policy, and varied to meet the wants, to suit the prejudices, and to foster the interests of the majority. An absolute indefeasible right to elect, or be elected, seems never to have been asserted on one side, or denied on the other; but the subject has been freely canvassed, as one of mere civil polity, to be arranged upon such a basis as the majority may deem expedient with reference to the moral, physical, and intellectual condition of the particular state.

"It was under this known diversity of constitutional provisions in regard to state elections, that the convention, which framed the constitution of the union, was assembled. The definition of the right of suffrage is very justly regarded as a fundamental article of a republican government. It was incumbent on the convention, therefore, to define and establish this right in the constitution. To have left it open for the occasional regulation of congress

would have been improper, for the reason just mentioned. To have submitted it to the legislative discretion of the states, would have been improper for the same reason; and for the additional reason, that it would have rendered too dependent on the state governments that branch of the federal government which ought to be dependent on the people alone. Two modes of providing for the right of suffrage in the choice of representatives were presented to the consideration of that body. One was to devise some plan, which should operate uniformly in all the states, on a common principle; the other was to conform to the existing diversities in the states, thus creating a mixed mode of representation. In favor of the former course, it might be urged that all the states ought, upon the floor of the house of representatives, to be represented equally; that this could be accomplished only by the adoption of a uniform qualification of the voters, who would thus express the same public opinion of the same body of citizens throughout the union; that if freeholders alone in one state chose the representatives, and in another all male citizens of competent age, and in another all freemen of particular towns or corporations, and in another all taxed inhabitants, it would be obvious that different interests and classes would obtain exclusive repre-

sentations in different states; and thus the great objects of the constitution, the promotion of the general welfare and common defense, might be unduly checked and obstructed; that a uniform principle would at least have this recommendation, that it would create no well-founded jealousies among the different states, and would be most likely to satisfy the body of the people by its perfect fairness, its permanent equality of operation, and its entire independence of all local legislation, whether in the shape of state laws, or of amendments to state constitutions.

"On the other hand, it might be urged in favor of the latter course that the reducing of the different qualifications, already existing in the different states, to one uniform rule, would have been a very difficult task, even to the convention itself, and would be dissatisfactory to the people of different states. It would not be very easy for the convention to frame any rule which would satisfy the scruples, the prejudices, or the judgments of a majority of its own members. It would not be easy to induce Virginia to give up the exclusive right of freeholders to vote; or Rhode Island, or Connecticut, the exclusive right of freemen to vote; or Massachusetts the right of persons possessing a given value of personal property to vote; or other states, the right of persons

paying taxes, or having a fixed residence, to vote. The subject of itself was not susceptible of any very exact limitations upon any general reasoning. The circumstances of different states might create great diversities in the practical operation of any uniform system. And the natural attachments, which long habit and usage had sanctioned, in regard to the exercise of the right, would enlist all the feelings, and interests, and opinions of every state against any substantial change in its own institutions. A great embarrassment would thus be thrown in the way of the adoption of the constitution itself, which perhaps would be thus put at hazard, upon the mere ground of theoretical propriety." [1]

Mr. John Randolph Tucker's views on this subject are expressed as follows:

"As the representatives are,[2] as we have shown, representatives of the States according to their respective numbers, and are to be elected by the people of the several States, it is obvious that the people of the State should designate the voters who should voice its will. It was therefore out of the question that the Constitution should fix the right of suffrage for these elections, and *a fortiori* that

[1] Story on the Constitution (3d Ed.), Vol. I. pp. 404, 405, 406, 407.

[2] Tucker on the Constitution, Vol. I. p. 394.

Congress should have the power to do so, and hence the right of suffrage was accorded to those whom the Constitution of the State, for the time being, qualified to vote for the most numerous branch of the State legislature. As the qualification of suffrage for the two branches of the legislature of many of the States at that time was different, that for the most numerous branch being the most liberal, it was agreed by the States ratifying the Constitution that the Constitution of each State, in designating voters for the most numerous branch of its own legislature, should designate the same for the most numerous and popular branch of Congress. The exclusive power in fixing suffrage for the House of Representatives is in the State, and the other States as parties to the Constitution agreed that the action of the State as to its own government should be the rule for the Federal Congress." [1]

Mr. Pomeroy, one of the clearest and ablest of the commentators on the Constitution, says:

"The national legislature has not, however, exercised the full power conferred upon it, and most of the regulations governing the choice of Representatives have been left to the separate states. Over the qualifications of the electors, Congress has

[1] *Federalist*, No. 52.

no control further than may be included in the clause by which the United States is to guarantee a republican form of government to each state.

"Here we perceive that the general government has no voice in deciding who shall be privileged to vote for Representatives in Congress. The whole subject is controlled by state laws. The states will, of course, in their own constitutions or statutes, declare which of their inhabitants may take part in choosing members of the popular branch of their local legislatures, and such persons are entitled also to vote for congressmen in that state.

"We are thus met by this peculiarity of the organic law, that it nowhere attempts to define what persons may exercise the right of suffrage, nor does it confer upon the general government any such power. In the only instance where provision is made for a popular election, the states are left to designate the individuals who may unite in electing.

"This fact is a complete answer to the somewhat common notion that United States citizenship implies the right of voting. Nothing can be further from the truth. Not a vote is cast, from one end of the country to the other, by any person in virtue merely of being a citizen of the United States. The Constitution recognizes the status of citizenship, and provides for admitting foreigners to that condi-

tion; but it does not create any class of voters. What the several states may do in this respect, is a matter entirely for their own consideration. It is true, as a fact, that, by the state laws, the great mass of voters for Representatives in Congress are white male citizens of the United States, who have attained the age of twenty-one; but there is no necessity in the Constitution for this practice. A state may deny to some citizens the right of suffrage entirely, as most do to the free negro, and all do to women and minors; or may deny it to persons of foreign birth for a certain period after naturalization, as does New York. Others still may confer the privilege upon persons who are not citizens of the United States, as do a few of the Western states.

"It is plain, therefore, that mere citizenship of the United States does not involve the right of suffrage. It is also plain that the United States have no power or authority to interfere with the discretion of the states in determining what class of persons possess the 'qualifications' for electors. The State laws may throw open the door as wide as possible, or may place any limitation which is not inconsistent with a republican form of government. In some, a property qualification has been demanded from the voter, and this practice was almost universal in the earlier years of our government; in a few a literary or

educational qualification is required. In a small number of commonwealths, free negroes are admitted on an equality with whites; in others, only those who possess a certain amount of property; while in most they are rejected altogether.

"Notwithstanding the control over this subject which the Constitution gives to the states is so great, so nearly absolute, it is limited by Article IV., Section IV., which says that the United States shall guarantee to every state a republican form of government. It seems to be evident that a state, under pretense of prescribing qualifications for electors, might place the governmental power in the hands of an oligarchy, and might erect such a political fabric as was in no respect republican in form. Should this be done, Congress might undoubtedly interfere in that particular state and restore a republican form. But to say that Congress may decide by a general rule what regulations governing the status of electors are consistent with the existence of a republican form of government, and may pass laws imposing those regulations upon the several states, is to ignore and destroy not only the spirit, but the very letter of the organic law. To say that a republican form of government implies universal suffrage, or that it forbids the imposition of qualifications which do not directly affect the voter's

capacity to judge properly of his political act of voting, is to violate all the fundamental rules of interpretation, to blot out all history, to declare that even the government of the United States is not republican. The plain common-sense view which the people have always taken of these provisions is the correct one. The clause 'The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature' has been uniformly construed to mean that the states may decide who of their inhabitants shall vote; and it has been left to the good sense of the people of each commonwealth to enlarge the class of voters from time to time as the ideas of popular sovereignty obtained more power." [1]

These authorities show clearly and explicitly exactly what the Convention did and the reasons for their action, and the existing provision placing the right of suffrage in the States entirely has proven satisfactory to the country for over a hundred years.

[1] *Pomeroy's Constitutional Law* (Bennett's Edition), pp. 134, 135, 136, 137.

CHAPTER II

VARYING CONDITIONS OF SUFFRAGE

IN the last chapter we showed in detail and by authorities that the original Federal Convention, with remarkable unanimity, had left the question of suffrage entirely in the hands of the individual States. The movement now on foot, and which is exciting the keenest interest in the country, is the proposition to amend the Constitution by proposing to the States for their ratification the following:

"*Section* 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

"*Section* 2. Congress shall have power, by appropriate legislation, to enforce the provisions of this article."

This amendment, if adopted, would create a radical change in the Constitution, taking from the States the right which they now possess of determining the right of suffrage as to each

seems suitable and best, according to conditions which exist in each separate State. The advocates of this proposition do not deny that it would be revolutionary in its effect, but contend that their cause is so just in itself, and appeals so to the reason and conscience of the country, as to sanction this revolutionary movement. The propriety and wisdom of granting the right of suffrage to women in these pages will neither be affirmed nor denied. It is not our object to enter this interesting field of discussion. But the sturdiest champion of woman's suffrage who believes in the doctrine of local self-government would be totally unable to agree that it should ever be brought about by the means proposed through this amendment.

The theory of local self-government which is plainly seen in the whole Constitution is in no place more clearly shown than in Article I, Section 2, and Article II, Section 2, wherein this whole question is left to the States: and the study of conditions existing in the forty-eight States of the Union to-day shows most conclusively the wisdom of the original proposition.

A reference to a few of the arguments which are advanced for woman's suffrage will show how utterly subversive of the principle of local self-government and how destructive of this principle in the Constitution the adoption of this amendment would prove to be.

One argument which is used with great force, and which certainly is not without merit, and is worthy of careful consideration, is that the right of suffrage for women is needed because under modern conditions so many of them in the dense population of our cities are compelled to make their own living in factories, mills, department stores, etc., and that, in these localities, such a right is necessary to them to uphold the standard of wages which are rightly due them and to protect them in their health and comfort as they daily labor for a meager subsistence. In the great cities of Philadelphia, New York, Boston, and Chicago, with their teeming millions, this argument is enforced with great earnestness and in many cases with great sincerity. If we admit its validity, and suppose for the moment that the whole question rests

on this one argument, can any reason be assigned why the right of suffrage should be forced upon women living in a village of five hundred inhabitants in another State, where no women may be engaged in those occupations in which the women of New York, Boston, Chicago, and Philadelphia are engaged? If the State of New York, for example, should insist upon the right of suffrage for women because it has five hundred thousand women inhabitants making their living in mills, factories, and department stores, why should this fact compel the State of Florida by the proposed amendment to adopt suffrage for women, when that State may have practically no women engaged in such occupations? The variety of conditions existing in the States of the Union owing to their difference of climate, occupation, and industries, together with their peculiar social and religious conditions, render an argument which might be conclusive as to one section of the country, impotent and elusive as to another. And it is that very fact which shows the wisdom of the Federal Convention in placing the right of suffrage in the

States and not in the Federal Government. Another example may be taken: It is claimed by the advocates of woman suffrage that in those States which have adopted it the women are practically unanimous in indorsing its exercise, and that this is shown by their exercise of the right. This argument undoubtedly has its force, but if it be admitted that all the women in all the States which have adopted woman suffrage approve it as wise and expedient, why should this view be accepted as a sanction of the right of the Federal Government to compel other States to adopt such a provision where the woman may neither desire the right nor sanction its exercise, and where conditions may exist that would render the introduction of women to the right of suffrage in the opinion of the women of those States manifestly harmful and injurious.

Mr. Winthrop Talbot in the *North American Review* for December, 1915, ..., has shown the surprising fact that illiteracy has increased in the New England States and Middle Atlantic States to a greater degree than any-

where else in the United States. This fact must come as a distinct shock to many who are acquainted with the well-known habit of the New England people from their earliest history of putting the public school in reach of every child of the State. The reason for this statement is given by the writer, and when examined causes no astonishment, for it is because in these States the number of foreign immigrants that crowd upon their shores year by year show a large percentage of illiterates, a large majority of them being of the laboring class of people. They bring with them their wives, their daughters, and their sons. The principles of our Government are unknown to them, and in a large measure they are ignorant of the beneficent system of government to which they come, and in many instances have been induced to come with the idea of obtaining higher wages, and of making their homes in America, where the idea of liberty has excited their imagination and given them a very incorrect notion of its real meaning. In these New England States the literacy test for suffrage is almost universal.

In view of the above facts, how unjust to New England it would be for the more fortunate States who have no such problem to solve to attempt by constitutional amendment by the Federal Government to adopt the principle of manhood suffrage throughout the United States, and even if such an amendment could be passed by the vote of two-thirds of each House of Congress, and be ratified by thirty-six States, exempt from these threatening problems, would not the spirit of fairness and justice suggest that such a movement would be both unwise and unjust?

The same principle applies to a large number of States in the South, some of which contain a majority of negroes over the whites, and which have for fifty years been attempting to work out this difficult problem. On what principle of justice could the States that are free from this problem, even if they have the power legally so to do, and thirty-six of them may be willing to do so, attempt by such a process to force upon these States a policy which they feel would endanger their civilization? And so a

slight change in the naturalization laws by Congress would involve the Pacific Coast States with the same problem, as applied to the Chinese and Japanese.

Numerous examples are given by the opponents of woman suffrage to show that though it be admitted that the grant to women of the right of suffrage in certain localities under certain conditions might be right and proper, that in other localities where conditions are different such right might be injurious and harmful.

Much of the misconception on this subject comes from a failure on the part of the advocates of the amendment to realize that the reasons which control the grant of suffrage are numerous and variable, and dependent not on fixed conditions but on conditions which vary in every State. Of the forty-eight States in the Union at present, it is safe to say that no two of them have exactly the same conditions of suffrage. This is a most striking and interesting fact. This being the case, will it be productive of harmony to give this right to the Federal Gov-

ernment? The people of each State are all Americans, actuated by a common desire and a common patriotism to develop American citizenship and American ideas. With this unity of purpose we find as many different conditions of suffrage in the country as there are States in the Union. This may be likened to the Christian religion, which, with one purpose, one desire, one hope, is utilizing several hundred denominations and sects to realize the one purpose common to all. Many of the unsophisticated have a vague and indefinite idea in their minds that under our system of government, if a man is a citizen of the United States he has a right to vote, and that if a man is an alien or unnaturalized citizen of the United States that he cannot vote. Neither is correct, and both are wrong, for the right of suffrage *does not depend upon citizenship*, and while objection has been made by quite eminent authorities to this condition of things, it has been defended with reason and force. In a sparsely settled community, far from the dense population of our great cities, where one hundred voters to

the square mile instead of one million to a square mile may occupy the territory of a State, the habits of life, the social and racial habits of the people, and the character of each individual may be well known, when it would be impossible in the denser populations to acquire such knowledge, and therefore the right of the State to use its own judgment in determining the right of suffrage of the inhabitants in two such territories has been claimed to be wise and prudent, for in one of them the State may easily determine from its own knowledge that the unnaturalized alien — the foreigner — possesses the character, the ability, the American ideas that entitle him to suffrage, even before he has acquired citizenship, while in the other, where the State from the density of population finds it impossible, through its agencies, to secure the necessary and requisite knowledge of the character and fitness of such foreign inhabitant for suffrage, the right of suffrage is withheld. To grant suffrage to foreigners who are not citizens, without the assurance and proof of their loyalty to America, would be dangerous and foolish, and

evidence of a disregard of the safety of the State and the Nation; but no State will introduce into its electorate an element believed to be dangerous to its welfare, and every State may be relied upon in this respect to do no act that will endanger its progress or that of the nation; and in no State where suffrage is allowed to foreigners can this right be exercised until the first step in naturalization has been taken.

In answer to the objection that this proposed amendment invades the domain of local self-government, and takes away rights of the States, it is surprising to find in some quarters an attempt to deny that its adoption would have any such effect, and indeed, even by those high in authority, and whose position should insure a clear conception of the relations of the State and the Federal Governments.

A public journal in one of the leading cities of the South recently gave an extended account of the visit of quite a distinguished party of women to the Senators of that State for the purpose of presenting their arguments in favor of the proposed amendment. Both Senators of

the State were present and a large number of women. One of them in her argument reminded the Senators that it was Southern delegates, including Washington and Madison, who represented Virginia (in the Federal Convention) who were in favor of the clause providing that amendments to the Constitution be ratified by three-fourths of the States; and that only Northern delegates opposed it. Whereupon, one of the Senators interrupted the speaker and is reported to have said: "You need not argue that point with me. I know that the amendment would not be an invasion of States' rights." (Applause.) The account given did not state whether the applause at the announcement of this sentiment came from the Senator's colleague, or from the ladies present, or from both. The remark, if made by a Senator of the United States, is most difficult of interpretation.

It would seem quite clear that if the States to-day, under the Constitution, possess the right of determining suffrage, that an amendment that proposes to take that right from them would invade the present rights of the States.

To-day the State may deny the right of suffrage to women. That is its right under the Constitution. If the amendment be adopted, the State may no longer deny it. Does not the amendment then invade the right of the State? Does it not take away from it what it now possesses? The fact that the States in the Federal Convention agreed that on the passage of an amendment by Congress by two-thirds of its members it might become a part of the Constitution when three-fourths of the States had ratified it, cannot justify the assumption that no right of a State is taken from it when such amendment is ratified. Indeed, the opposite is the result. If this amendment should pass the Congress of the United States by a two-thirds vote of both Houses, and should be ratified by three-fourths of the States, not including Connecticut, would not Connecticut be deprived of her right to say that women should not vote? And has she not that power to-day? Of course, if such an amendment is adopted there can be no collision between the Federal Government and the State of Connecticut on

that subject, for the amendment will have been legally and constitutionally adopted, but its adoption would mean the taking from Connecticut by the vote of three-fourths of the States of the Union, *and against her own vote to the contrary*, a right which she possessed before its adoption. It is not denied and cannot be denied that if the proposed amendment is passed by Congress in the constitutional manner and is ratified by three-fourths of the States, that it becomes a part of the Constitution of the United States, binding upon all of the States — those which have ratified it, as well as those which refused to ratify it, — and it is that very fact that emphasizes the argument that we are attempting to make, that while such an amendment would be legal and constitutional, just as the Fifteenth Amendment is claimed to be, yet that its adoption against the protest of one-fourth of the States of the Union (which States might constitute a majority of the people of the United States), might lead to results as effective in evading it as those which followed the adoption of the Fifteenth Amendment.

The amendment when once adopted would not invade the rights of the States, for there would be no right of the State that could conflict with it — the amendment will have taken it away.

The argument of the Senator referred to would seem to be that as the method of securing the amendment is prescribed by the Constitution which was assented to by the States, that what the amendment accomplishes, what it carries with it, cannot deprive the State of any existing right. The method proposed is admitted to be legal and constitutional, but the effect of it, if adopted, is to take from the States a right which they have had since the foundation of the Government. If the method of procedure, because constitutional, can obscure or destroy the object and result of an amendment, then form has been substituted for substance.

It is recorded that Jacob agreed with Laban to work seven years for him upon the condition that at the end of that time he was to receive Rachel as his wife. Under the civilization of that ancient day, this contract would seem to

have been valid, as the record does not question its validity; but supposing it to have been legal in that day, how does it result? When the seven years was up and the contract enforced, Laban could hardly say that no right of his had been taken away by the contract. Rachel is gone. She is no longer his. True it is that she has gone because it was so agreed under the contract. Under their law the contract is supposed to have been legal, and Laban by the contract agreed to her leaving him after seven years. He has no right perhaps to complain of the enforcement of the contract, but the contract, when enforced, deprives him of his daughter.

The States in the Convention agreed to the mode prescribed for change in the Constitution by amendment. Like Laban's contract, that agreement is valid, but when the contract is carried out by the adoption of the proposed amendment, the States, one of the parties, are deprived of a right which was theirs. In the consideration of this question, therefore, while the legality of the proceeding is unquestioned,

one fact must not be lost sight of: that one distinct idea permeates the whole Constitution, and that is, that while to the Federal Government is entrusted the National powers which pertain to the people of all the States, for they are powers in which every individual of every State is equally interested, all else, which includes the rights of the people of the several States under their State Governments, their county governments, and their magisterial and municipal governments, is left to these governments for their sole and exclusive control; and therefore, while undoubtedly the legal power to amend the Constitution of the United States is unlimited, and by it the most important local rights of the people may be taken and conferred upon the Federal Government, still before such action is taken, in view of this principle which controlled in the original formation of the Constitution and has followed us to this good day, the people of the States should consider well whether they are justified in breaking down the original structure of the Government by taking from its pillars the stones which are

necessary to its support. At least, it is a question of policy — whether the change proposed is wise — and not of method of procedure.

Senator Dixon of Connecticut, when the Fifteenth Amendment was under consideration in the Senate, was taunted by his colleague, Mr. Ferry, because he objected to the vote being granted to the negroes by such amendment, rather than by the people of the State of Connecticut in their own State Convention. During the course of the debate he said:

"The question is whether the independence of the State of Connecticut shall be invaded; the question is whether she shall be humiliated, whether she shall be humbled in the dust, whether she shall be told that for more than one hundred years she has been guilty of this wrong upon the negro race, and that, inasmuch as the people of the United States are hopeless of her ever reforming that wrong herself, believing that she is lost to all sense of honor and right, you propose to come in here and by an external power drag her to the reluctant performance of a neglected duty. That is what I object to in my colleague."

In addition he said:

"They (the citizens of Connecticut) may be willing, as I intimated in my remarks the other day, when the question shall be presented to them, to grant to the few colored men in the State of Connecticut the elective franchise; but, sir, that is not the question. There is a question which lies far deeper in their minds than that. It is the question how this right shall be given. Who shall decide it? For, sir, with all your attempts at distinction, you cannot escape the conclusion that if Connecticut makes this change, strikes this word 'white' from her constitution by the compulsion, legal or otherwise, of other States, she loses her right to regulate that question for herself: and a State which cannot regulate that question for herself is in no sense an independent State." [1]

It is said by some that the reason for resorting to the proposed amendment, instead of looking to the States for action in their separate capacities, is because there are certain States that will not listen to argument, whose legislators have shut their ears deliberately against hearing any arguments that might lead to the adoption of suffrage for women, and that it is

[1] Congressional Globe, Part 2, 3d Sess., 40th Cong., 1868–1869, pp. 860–861.

impossible to obtain suffrage from such States and therefore its advocates are driven to resort to the Constitutional Amendment in order to accomplish the result. This argument proves too much, and is used as one of the strongest points by the opposition; for it is said that if the people of a State are so impressed with the impropriety and unwisdom of granting women the right of suffrage, and if they believe that it would tend to injure, rather than benefit, the State, and that the reasons which are sufficient to justify its adoption in other States do not prevail in theirs, and they are, in fact, firmly and finally fixed in their judgment that it would be subversive of good government, no amendment of the Constitution, they claim, would be sufficient to force them to carry out its provisions in good faith. Its enforcement might be evaded, and its opponents argue that the history of the Fifteenth Amendment should be a sufficient warning to those who would defy the public sentiment of the recalcitrant States. In the case of the Fifteenth Amendment, such action was justified because it was claimed to

be necessary to save American civilization, and there are those who claim to believe that the adoption of the proposed amendment would tend to destroy the home as Americans have known it and have been taught to love and admire it — the foundation of American ideals.

It is an accepted doctrine, drawn from the experience of statesmen, of States, and of communities, that no law, however just or beneficent it may be in the eyes of its promoters, which does not meet with the indorsement and acceptance of the community, of the county, or the State for which it is intended, can ever be properly enforced, and this is well illustrated by reference to what are known as prohibition laws, which are impotent for good and unenforceable when the community to which they apply is opposed to them. When the Fifteenth Amendment was under discussion in the Senate of the United States, Senator Conkling, who opposed its adoption, with wonderful prescience prophesied how the amendment, if adopted, could be legally evaded and his suggestions were

adopted successfully by many States.[1] If the proposed amendment is passed by Congress at its present session (1916), and sent to the States and ratified by three-fourths of them within the next twelve months, what effect would it have upon the States of Pennsylvania, New York, New Jersey, and Massachusetts, which have only recently rejected the proposition? It is only recognizing a principle which is common to human nature, when the belief is expressed that the adoption of this amendment would arouse an intense and turbulent feeling among the people of the States just mentioned. Human nature is alike the world over, and when these States which have just passed upon this question realize that their judgment and their will is to be subverted by other States who know but little of their domestic conditions and policies, it will naturally arouse a feeling of resentment which will bode no good to the power which has forced this discarded principle upon them.

[1] Congressional Globe, 40th Cong., 3d Sess., Vol. II, p. 1304. See also speech of Senator Morton of Indiana in the Senate of the United States to the same effect, Feb. 4, 1869. *Id.*, p. 863.

When the Fifteenth Amendment was under consideration in the Senate, Senator Bayard of Delaware, in referring to "the tyranny of party in forcing such a provision through the Senate," said:

"They will find that their object will be defeated, because, if you attempt to impose upon the people of this country a suffrage of that kind *against their consent*, through the mere medium of party legislatures, you will find that your party will utterly fail in being sustained by them. It may lead to revolution; it may lead to destruction of the institutions of the country; it cannot lead to good." (Cong. Globe, part 2, 3d Cong., 40th Cong. 1868–1869, p. 1304.)

Another fact must be observed in the matter of proposing amendments: Since two-thirds of both Houses of Congress must pass and three-fourths of the States ratify any proposed amendment, it is evident that no amendment can be adopted *usually* that has not a majority of the people of the United States in its favor, but this, as we will see, is subject to exceptions. The requirement that three-fourths of the States shall ratify shows that generally no amendment

would stand any chance of adoption that is not popular throughout the country, but the attempt to pass this amendment through the Congress now when only eleven of the States of the Union grant the full right of suffrage to women, while many States have recently defeated it with populations far exceeding those of the suffrage States, whose aggregate population is less than 8,000,000, or less than one-twelfth of the population of the United States, would seem to show that the movement for the amendment has been started prematurely. If New York, Pennsylvania, Massachusetts, and New Jersey had during the recent elections granted the right of suffrage to women, this would have shown a prevailing sentiment in four States whose population amounts to about 23,000,000, or to nearly one-fourth of the total population of all the States, but on the contrary these States contain about 23,000,000 of people who have recently rejected the proposition, and now at the instance of eleven States with less than 8,000,000 population, it is proposed to force the adoption of this amendment upon the

whole country. Or to state it differently, eleven States with an aggregate population of 8,000,000 have adopted woman's suffrage, while States with an aggregate population of about 36,000,000 have rejected it in the past year. Three-fourths of the States are required to ratify before it can be adopted. Is not the present attempt a little premature, therefore, when States with a population of nearly four times the population of those which have indorsed it, have recently rejected it, while many others, as we shall see, containing a majority of the people of the United States have rejected it in the past few years? If the amendment did not take away an essential right of the States and was admitted to be the proper mode of procedure to secure such right, still the rejection of it by so many States containing more than one-half of the population of all the States should certainly cause its proponents to await "the kindlier light of a better day" for urging its adoption.

The history of the Fifteenth Amendment shows how useless the adoption of an amendment to

the Constitution may prove where it has not the sanction of popular approval behind it, and the adoption of this amendment may show like results. The eleven States that have granted full woman suffrage, viz., California, Nevada, Colorado, Washington, Montana, Utah, Wyoming, Idaho, Kansas, Arizona, and Oregon, have a population in round numbers of 8,000,000 of people.

New York alone, that rejected woman suffrage during the past year, has a population of 9,113,614; or the one State of New York that has rejected it has more population by a million than the eleven States that have granted suffrage to women, and yet in voting in the Senate on this Amendment the eleven States will have twenty-two votes and New York *two*.

The State of Pennsylvania that rejected woman suffrage during the past year by 53,000 majority, has a population of 7,665,111 — very nearly the population of the eleven woman-suffrage States.

After an amendment to the Constitution proposed in Congress has passed that body

by a two-thirds majority in each House, it must be ratified by three-fourths of the States, that is, thirty-six States are now needed for its ratification.

Now, the twelve States of New York, Pennsylvania, Massachusetts, Illinois, Ohio, Indiana, New Jersey, Wisconsin, Georgia, Michigan, Missouri, and Texas, have an aggregate population of 50,831,927. The total population of the United States[1] is 91,715,988 without Alaska or Hawaii. If we deduct from this 91,715,988 the population of the twelve States just named, in round numbers 51,000,000, we have for the population of the entire thirty-six other States of the Union, about 40,000,000, — that is, it is possible for thirty-six States, with 40,000,000 inhabitants, to adopt an amendment to the Constitution, as against 51,000,000 in the twelve States enumerated. The result becomes more interesting when it is noticed that every State of the twelve mentioned above, except Illinois and Indiana and Georgia, has either rejected woman suffrage by a vote of

[1] *World's Almanac*, p. 667 (1916).

the people, or through their Legislatures. New York, Pennsylvania, Massachusetts, and New Jersey in 1915 voted down this proposition.

Ohio in 1912 rejected the amendment by 87,000 and again in 1914 rejected it by 183,000.

Wisconsin in 1912 rejected it by 91,000.

Michigan in 1912 rejected it by 760, and in 1913 again rejected it by 96,000.

Missouri in 1914 rejected it by 140,000.

During the last year the proposition was voted down in the Texas Legislature by a vote of 90 to 32.

Since Indiana and Illinois have given partial suffrage to women, the presumption is that if these States had favored full suffrage, each of them would have adopted it, and that the grant of limited suffrage by them is proof of their opposition at the time it was adopted to full suffrage.

Georgia alone, therefore, of the twelve States mentioned, seems to have taken no action in the matter.

Another evidence of the fact that the country is not ready for this amendment may be seen by

an examination of what was done during the past year on this subject in the different States.

In February, 1915, the North Carolina House rejected the amendment.

In the same month and year the Senate of South Dakota rejected the House bill allowing modified suffrage.

In March, 1915, the proposition was rejected in the Texas Legislature and in the Delaware Legislature, while the House of Delegates in Maine rejected the Senate bill for suffrage by a vote of 88 to 59.

In the same month and year the Rhode Island House rejected limited suffrage by a vote of 65 to 31.

In the same month and year the Connecticut House, by a unanimous vote, rejected the bill, and on April 8, 1915, the Connecticut House rejected the same bill by a vote of 124 to 106.

In April, 1915, the Wisconsin Legislature rejected a bill to submit the question to the people.

In the same year and month the Florida House rejected a like bill.

In July, 1915, the Wisconsin Senate refused to reconsider the bill to submit the question to the people.

In addition to these evidences, in 1914 South Dakota gave a majority of 11,914 against woman suffrage.

In the same year Nebraska defeated it by 10,000, and North Dakota by a majority of 9000.

If the success of an amendment to the Constitution is dependent upon popular approval, it is submitted after this recital that this amendment should be pressed before the people of the States for some time to come before its passage by Congress and adoption by the States could be obtained with the approval of a majority of the people of the United States. This is quite evident from the fact that last year States with about 36,000,000 population rejected this proposition either by legislative action or by the vote of the people of the several States. An additional fact lends weight to this conclusion, namely, that since the year 1912 sixteen States with approximately 48,000,000 of popula-

tion have likewise rejected suffrage for women either by a direct vote or through their Legislatures. They are the States of Nebraska, North and South Dakota, Wisconsin, Florida, Connecticut, Rhode Island, Texas, North Carolina, Missouri, Michigan, Ohio, New York, Pennsylvania, Massachusetts, and New Jersey.

CHAPTER III

AMENDMENT, AN ORGANIC CHANGE

THE objection to the proposed amendment is fundamental. When the thirteen States originally met in Convention and formed the Constitution, they gave to the Federal Government by enumeration certain great national powers which were distributed among the executive, the legislative, and judicial departments of the Government. These were all national powers which the States in convention agreed were necessary in the formation of a strong government. Certain others, however, were specifically denied to the Federal Government. And then certain rights were granted to the States, while other things were denied to the States. When this had been accomplished and the framework of the government set up, the Tenth Amendment was added, providing that the powers that had not been granted to

the Federal Government, or denied to the States in this instrument, remained with the States or with the people. The right of suffrage involved in this amendment was not one of the reserved rights of the States, but it was a right by specific grant in Article I, Section 2; and the Constitution as framed was thought by its makers to have established an equilibrium of power between the States and the Federal Government which would operate for the advancement of both and the fulfilment of the highest hopes of the people for individual liberty. If that system of government is to continue, and if, as we are proud to boast, we possess the freest and best government in the world, it cannot be maintained unless the constant and persistent attempts to change its organic principles be successfully resisted. That the Constitution may be legally amended, no one can doubt; that it *ought* to be amended in fundamental principles causes much doubt in the minds of many. If the powers which belong to the States are by amendment taken over by the Federal Government, or the powers of

the Federal Government, by amendment given to the States, the balancing of powers will be destroyed, and an unjust inequality of power established that must result in the destruction of our present form of government. If this amendment is adopted, why may we not expect another prohibiting the manufacture, sale, or use of spirituous liquors in any form in the States? Indeed the latter is already knocking at the door of Congress. It will be admitted that under the present Constitution the right of the States to control this subject, independently of the Federal Government, is as clear as that the right of suffrage resides in the States to-day to the exclusion of the Federal Government. And yet some people vainly imagine that the people of California and Washington and Nevada, and the other States of the Union, though separated by thousands of miles and ignorant of local conditions, can better manage the local affairs of the people of New York than they themselves can hope to do.

The constant attempts to break down the proper relations between the States and the

Federal Government and centralize all powers at Washington is certainly a just cause for alarm. It is boldly proposed in Congress to-day that no article of manufacture shall be the subject of interstate commerce that is made by the labor of a child in any State under fourteen years of age. Has our political history ever shown a clearer example of the lust for power by Congress than this, or a bolder attempt at spoliation and robbery of the States? None will dispute the wisdom and justice of the sentiment that works for the betterment of childhood in its struggles for existence, and no one can fail to add the weight of his influence to legislation that will better the conditions of the thousands of struggling children in our land; but when we examine the reports of Congress and the evidence there collected on the subject, we find the voice of humanity is drowned by the demands of commercialism and the real issue is found to be not the broad sympathy for suffering childhood, but a desire to protect certain interests from ruinous competition in other parts of the country. Child

labor at fourteen years of age is cheaper than adult labor. The goods that are produced by it are cheaper than goods made by adults or by children over fourteen years of age, and since Congress confessedly could not pass a law prescribing the hours of labor or the age limit at which a child may work in the several States of the Union, refined legal ingenuity has suggested that as the goods made by child labor may pass the bounds of the States in which they are made and may become articles of commerce, that the Federal Government has the power to prohibit their entrance into interstate commerce. If such a view can be maintained, the manufacturers of other goods may find like reason for invoking this principle to destroy competition, by having Congress pass an act that any goods made in a factory where the eight-hour law or the six-hour law does not obtain shall not be the subjects of interstate commerce. California fruit produced by the cheap labor of the Japanese and Chinese may be excluded from traffic through the States because the hours of labor of such workmen or

the wages paid such workmen do not compare with those who are compelled to produce those fruits artificially in the hothouses of the East.

Virginia tobacco made by negroes may be denied the markets of the world because the Connecticut Valley tobacco is raised on a higher scale of wages and fewer hours of labor.

Competition between the beet sugar of the West and the cane sugar of Louisiana may experience like results.

If the Government of the United States may not use its taxing power to tax out of existence a competitor in business, can it use its commercial power to bring about the same results? Our political history from the foundation of the government has witnessed the bitter struggle between these two contending powers — Federal and State. Our only safety is in the preservation of each in the Constitution as the fathers intended them to be, and not by taking from the States, and bestowing upon the Federal Government, powers which are essential to independent and autonomous States, to break down a system in which the States and the

Federal Government are each dependent upon the other for the perfect development of each. My plea is for the preservation of the integrity of the Constitution in all of its parts as the surest guarantee of liberty for the American citizen, and my objection to such amendments and legislation by Congress is that they impeach the integrity of that instrument and serve to destroy its just division of powers, and by transferring such questions from the States to the Federal Government for its control, the power of the citizen to control such subject is thereby diminished and it is placed in the hands of those who are strangers to the local policy to be affected; in effect it puts in the hands of the other forty-seven States of the Union the power to control the local policies in each State against the wishes, it may be, of the State affected. This was clearly never intended and is opposed to the genius of the whole Constitution.

CHAPTER IV

ANALOGY OF FIFTEENTH AMENDMENT

ONE argument which is relied upon by the advocates of a constitutional amendment giving suffrage to women is the fact that when the United States had determined to give the negro the right of suffrage they adopted the Fifteenth Amendment to the Constitution in the following language:

"*Section* 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude.

"*Section* 2. The Congress shall have power to enforce this article by appropriate legislation." [1]

The proposed amendment is in the exact language of this Fifteenth Amendment, if we

[1] Many of the facts relied on in this Chapter relating to the adoption of the Fifteenth Amendment have been taken from the able address of Hon. A. C. Braxton on the Fifteenth Amendment delivered before the Virginia Bar Association in 1903, and which is published in the proceedings of the Association for that year.

substitute for the words "race, color, or previous condition of servitude" the word "sex." The claim is made and enforced by specious argument that if the United States could grant the freedmen suffrage by preventing the States from denying that right on account of race, color, etc., it would be equally appropriate to grant freedom to women, who are in some States, they claim, in a state of practical slavery by the denial of the right of suffrage. It is unfortunate for the cause of woman's suffrage that its advocates have found an argument for their cause in the adoption of the Fifteenth Amendment. Two reasons stand out prominently against the validity of such an argument. In the first place it is by no means accepted as true that the Fifteenth Amendment in prohibiting the States from denying the right of suffrage to the negro because of his race was an act of wisdom; indeed it is now generally admitted to have been unwise at that time, and the history of the times shows that the Amendment, even at the time of its adoption, would not have received the popular approval

of the people of the United States could a vote have been taken thereon.

To show that the Fifteenth Amendment never had the sanction of popular approval, it is of interest to consider certain facts arising out of the history of the times prior to and up to the time of its adoption.

Slavery was no doubt the great issue in the campaign which resulted in Mr. Lincoln's election, but it by no means follows that all of those who desired to abolish slavery were advocates of suffrage for the negro. New Hampshire, Vermont, Massachusetts, and New York were the only States which in 1861 by their Constitutions allowed the negro to vote. The remaining thirty States of the Union denied them this right. This fact is of interest, because throughout the North and West there were very few negroes, and their votes would not have been appreciable in their States. By the census of 1860 there were in New Hampshire 149 negroes of qualified age to vote, and 91,954 whites; in Vermont there were 194 negroes and 87,462 whites; in Massachusetts there were

2512 negroes and 339,085 eligible whites; in New York there were 12,989 negroes and 1,027,305 whites. Massachusetts, however, required a literacy test and prepayment of taxes as a prerequisite for voting, while New York required of the negro the possession of $250 worth of property, which was not required of the whites. These two conditions in Massachusetts and New York would reduce the number of negroes who could vote in those four States to not more than 1000 or 2000. This being the case in 1861, how did the change come so quickly? No political party had ever declared for negro suffrage in its platform. Not in 1860, nor yet in 1864, was there such declaration. Mr. Lincoln himself was opposed to it in 1861, and even later. In his debate with Judge Douglas at Ottawa, Ohio, in 1858 he used the following language:

"I have no purpose to introduce political and social equality between the white and the black races. There is a physical difference between the two which, in my judgment, will probably forbid their ever living together upon the footing of perfect

equality; and, inasmuch as it becomes necessary that there must be a difference, I, as well as Judge Douglas, am in favor of the race to which I belong having the superior position. I have never said anything to the contrary; but I hold that, notwithstanding all this, there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence — the right to life, liberty and the pursuit of happiness. I hold that he is as much entitled to these as the white man."

His views became somewhat modified, and in the last speech he made, April 11, 1865, he suggested that the "very intelligent" among the negroes and the soldiers who had fought for the Union might be trusted with the ballot. Under these two tests it is of interest to remark that many negroes in Virginia to-day exercise the right of suffrage on precisely the ground suggested by Mr. Lincoln, namely, intelligence, or that they were soldiers in the war for the Union.

As indicating that there was no popular movement for suffrage for the negroes, an examination of the Constitutions of the States will show that twenty-seven of the thirty-seven

States of the Union in the decade prior to 1867 either adopted new Constitutions or amended their old ones. That examination will also disclose the fact that not in one of the twenty-seven Constitutions or amendments thereto was the right of suffrage extended to the negro; but it will show another fact — that in every case where it was attempted to be done, it was denied.[1]

In December, 1863, Mr. Lincoln prepared a Reconstruction Plan for the South, and it was made public, by which the seceding States were to be reconstructed. In this plan negroes were expressly excluded from voting.

In March, 1864, Mr. Lincoln wrote to the Military Governor of Louisiana as follows:

"I barely suggest, for your private consideration, whether some of the colored people may not be let in, as for instance, the very intelligent, and especially those who have fought so gallantly in our ranks."

This apologetic suggestion of Mr. Lincoln's, however, was not carried out, even in Louisiana, at that time.

[1] *See Poore's Constitutions.*

The Congressional Reconstruction Bill, which was finally passed by the Senate, July 2, 1864, and advocated in the House by that brilliant partisan Henry Winter Davis, and in the Senate by Benjamin Wade of Ohio, provided that "white males of twenty-one years of age should be allowed to vote." Even at this date such partisans as Davis, Wade, etc., were not advocates of negro suffrage.

During this year Mr. Lincoln was renominated for the Presidency, but the platform on which he was nominated did not call for negro suffrage, nor did the platform of the radical Republican Convention which met at Cleveland and nominated Fremont and Cochrane. The latter did demand civil rights for the negroes.

In the year 1864 Connecticut, Kansas, Nevada, Pennsylvania, and Rhode Island adopted new Constitutions or amended their old ones, but there was no change in any of them in favor of negro suffrage. During that year Nevada was admitted to the Union with a Constitution declaring for white suffrage. Still

the fight was kept up by the advocates of negro suffrage, and in 1865 Connecticut, Wisconsin, Minnesota, and the Territory of Colorado submitted to the people amendments allowing negro suffrage. These amendments were rejected in each of these States and in the Territory of Colorado. Maine and Missouri also amended their Constitutions that year, but there was no change for negro suffrage in either, but a distinct rejection of it when submitted to the people of the States of Connecticut, Wisconsin, Minnesota, and the Territory of Colorado. In the latter the vote was 476 for negro suffrage and 4192 against it.

In December, 1865, by a law of Congress, the question of negro suffrage was submitted to the people of the District of Columbia. On that question the vote stood in Georgetown: for negro suffrage, 1; against it, 812. In the City of Washington, for negro suffrage, 35; against it, 6521. Such a vote would seem to indicate a very pronounced sentiment against negro suffrage; and yet the House of Representatives, in less than a month after this vote was taken in

the District of Columbia, on the 18th of January, 1866, passed an act giving the negro the right to vote in the District. The Senate, however, was unable to pass this House Bill until January 9, 1867, so that at this latter date suffrage was granted to the negroes in the District. So unpopular, if not so unbearable, was the condition of things, that Congress, within three years from that date, was forced to pass an act abolishing suffrage altogether in the District of Columbia. And it is of interest to note, in the history of this question, that the Congress, sitting in January, 1867, was the first to inaugurate negro suffrage in this country, and Congress with many of the same members, within three years, was the first to abolish it. And many of the men who voted to abolish it in the District because it was unbearable became the advocates of the Fifteenth Amendment to prevent the States of the South from denying this right to the negro when they themselves had felt obliged to abolish negro suffrage in the District of Columbia which they had only recently granted.

In June, 1866, the Territory of Nebraska

adopted a Constitution containing white suffrage. In February, 1867, Congress passed an act admitting Nebraska to the Union on the "fundamental condition" that negroes should be allowed to vote; and the same act authorized the Legislature of Nebraska to consent for the State, so that the people did not have a vote on the question.

On March 2, 1867, another Reconstruction Act was passed by Congress. The sentiment for negro suffrage was growing. The act passed by the House in July, 1864, contained no such provision. This act did, and while it granted to the negro the right to vote, it disfranchised most of the white men in the South.

In April, 1867, the Legislature of Ohio submitted an amendment to their Constitution providing for negro suffrage. In October of that year it was voted down by 50,000 majority.

In November of the same year, Kansas and Minnesota voted down Constitutions containing like provisions.

In November, 1868, at the presidential elec-

tion, Iowa enjoyed the distinction of being the first State in the Union, voluntarily and without compulsion, to adopt an amendment to their Constitution providing for negro suffrage. It was adopted, however, by a majority of 22,000 less than the Republican majority that year.

In 1865, and even in 1867, Minnesota had voted down an amendment providing for negro suffrage. In November, 1868, it voted it in. And Minnesota was the second State in the Union that voluntarily incorporated negro suffrage in its Constitution.

In 1868 Missouri rejected it.

On the 6th of April, 1868, Michigan defeated it by 39,000 majority, while the Republicans carried the State by 32,000 majority.

In a speech in the Senate of the United States on the 28th of January, 1868, Senator Wilson of Massachusetts declared:

"There is not to-day a square mile in the United States where the advocacy of equal rights and privileges for those colored men has not been in the past, and is not now, unpopular."

Senator Charles Sumner, of Massachusetts, on the 5th of February, 1869, in a speech on the Fifteenth Amendment used this language:

"Beyond all question, the true rule under the National Constitution . . . is that anything for Human Rights is constitutional. . . . There can be no State Rights against Human Rights: and this is the supreme law of the land, anything in the Constitution in favor of any State to the contrary notwithstanding. The hesitation to present the *amendment* is increased when we consider the difficulties in the way of its ratification. I am no arithmetician; but I understand nobody has yet been able to enumerate the States whose votes can be counted on to assure its ratification. . . . The same thing may be accomplished by an Act of Congress without any delay — without any uncertainty. . . . I do not depart from the proprieties of this occasion when I show how completely the course I now propose harmonizes with the requirements of the political party to which I belong. Believing most sincerely that the Republican party, in its objects, is identical with country and with mankind, so that in sustaining it I sustain these comprehensive charities, I cannot willingly see this agency lose the opportunity of confirming its supremacy. You need votes in Connecticut, do you not? There are three thousand

fellow-citizens in that state ready, at the call of Congress, to take their place at the ballot-box. You need them also in Pennsylvania, do you not? There are at least fifteen thousand in that great State waiting for your summons. Wherever you need them most, there they are; and be assured they will all vote for those who stand by them in the assertion of equal rights."

With this summary of facts prior to the adoption of the Amendment, I beg to quote from the New York *Herald* of February 6, 1869:

"Upon a question of negro equality or no negro equality, placed distinctively before the whole people, we are firm in our conviction that the affirmative would be voted down by an overwhelming majority."

Three things contributed to the passage of this amendment — gratitude to the negroes who fought the battles of the Union; fear of the so-called rebel element in the South, that they would control the negro; and a desire to perpetuate the dominant party in power. "Thus we have, as the inspiration for negro suffrage,

gratitude, apprehension, and politics — these three — but the greatest of these was politics."

At the time of the adoption of this Amendment negro suffrage had been forced on ten of the insurgent States and eight or ten other States, North and West, had finally granted that right to the negro. But omitting the eight or ten Southern States upon whom it had been forced by Congress, less than one-fourth of the Northern and Western States had voluntarily and freely granted this privilege to the negro.[1]

The second reason why the Fifteenth Amendment furnishes no valid argument for the proposed woman's suffrage amendment is that that amendment has shown in its practical operation, more strongly than any language can depict, the utter futility of attempting to enforce a policy believed to be hostile to the best interest of any considerable portion of the country and destructive of their civilization; for it is a well-known historic fact that this amendment

[1] Speech of Senator Willey, West Virginia, February 5, 1869. Congressional Globe, 3d Sess., 40th Cong., Part II, p. 912.

which was intended to give the negro, just emerging from slavery, the high and responsible right of suffrage, for which he was totally unfitted, was powerless to effect its object in every State of the Union where the negro population was sufficiently large to threaten Anglo-Saxon supremacy. The passing years have happily mitigated the feelings which were aroused at that time, and at this distant point of view we can consider the question calmly and historically. It is sufficient to say, without further comment, that the impartial and masterful treatment of the results of the passage of the Fifteenth Amendment by James Ford Rhodes of Boston in his *History of the United States* leaves to the most critical student nothing more to be said. It must not be inferred that the results of the Fifteenth Amendment in giving the illiterate and untutored negro the right to vote would be duplicated in its baneful results in the adoption of the amendment which proposes to give to the women of the country the right to vote, though it would include the negro women, a large majority of whom, it is

only fair to say, would be totally unfitted for suffrage. Of course an electorate of negroes recently freed from slavery and an electorate of the women of the country are two very different propositions when considering the results of the two, but the lesson to be learned from the Fifteenth Amendment is this: The advocates of the proposed amendment assert that they must resort to the Federal Government to accomplish their purpose because certain States of the Union are fixed and determined in their opposition to woman's suffrage, and they desire to secure the adoption of the amendment, even though they have to secure it against the strenuous opposition of certain States. This was the argument advanced by the advocates of the Fifteenth Amendment. Now if the Fifteenth Amendment without popular sanction was adopted for the purpose of compelling the States by indirection to give the right of suffrage to the negro, and it was successfully evaded in certain States because they believed it meant the destruction of free government, and those States have, by legal

provisions, which have met the approval of the Courts, destroyed the effect of the amendment where it was intended to be especially potent; and if certain States are now fixed in their judgment that woman's suffrage would not be best for their peculiar conditions, but would be harmful to the best interests of the State, — might not the history of the Fifteenth Amendment be repeated, should the proposed amendment be adopted?

The platform of the Republican party in 1868 furnished an interesting contribution to this question.

"Resolution 2. The guaranty by Congress of equal suffrage to all loyal men at the South was demanded by every consideration of public safety, of gratitude, and of justice, and must be maintained; *while the question of suffrage in all the loyal States properly belongs to the people of those States.*"

It would be interesting to know how questions of "public safety," feelings "of gratitude," and considerations of "justice" could make an act of Congress constitutional in one section of the country, and subversive of it in another, where

"gratitude" and "justice" were unknown, and only a spirit of "loyalty" abounded.

The history of this amendment shows how vain it is to attempt to force upon a people any system of government which they believe to be destructive of their civilization. The Declaration of Independence, and the Constitutions of some of the original States, notably of Massachusetts, Pennsylvania, and Virginia, declared that there are certain inalienable rights of which no people can be deprived. The Bill of Rights of Virginia, adopted June 12, 1776, declares "All men have certain inherent rights, of which when they enter into a state of society, they cannot by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, etc." The original Constitution of Massachusetts, Article I, declares, "All men are born free and equal, and have certain natural, inherent and unalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberty; that of acquiring, possessing and protecting property, and that of seeking and obtaining their safety

and happiness." The original Constitution of Pennsylvania declares "All men are born free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property." The people of many of the States of the Union felt justified in evading the Fifteenth Amendment because by it they were prevented from excluding from the right of suffrage those whose domination, in their ignorant condition, might result not only in the destruction of their property, but of their liberty itself.

If the people of these States need defense it may be found in the language of these Constitutions of the old States, as well as in the language of the Declaration of Independence, wherein certain rights to life, liberty, happiness, and the possession of property were declared to be inalienable. These great authors of constitutional liberty meant to declare that while governments were necessary for society, that when society instituted a government for its proper control, there were certain rights inherent

in every citizen, not the gift of government, but the gift of God to his children, which could not be taken away by government. These original Constitutions of Massachusetts and Pennsylvania, the Bill of Rights of Virginia, and the Declaration of Independence, teach a lesson which, alas, is too little learned by the people of America, and too little taught by the statesmen of the country.

It is not our purpose to discuss the legality of the adoption of the Fifteenth Amendment, but it is the wisdom of its adoption at that time that we seriously question. In many parts of the South the result of the adoption of this amendment was to put the control of States in the hands of the negro population, to rule and dominate them, while the property owners and the most intelligent among the whites were by the act of the same government which forced the adoption of this amendment, excluded from the right of suffrage. This amendment was confessedly adopted in the interest of the negro, that he might have a vote to protect himself from the white people of the South, as

was alleged, while at that very time many of the States of the North denied the negro in their States the right of suffrage. Its projectors failed to take note of a fact which the history of the world teaches: That no power, no human power — can ever prevent a people or a class of people that *deserve suffrage from finally obtaining it*, and the equally relevant fact that no power can successfully force into the electorate of a State by legal enactment those who are believed to be unfitted for it, or dangerous to its peace and progress.

The history of this amendment is now being written free from the unhappy passions incident to the hour, and the position of the South in that unhappy hour is receiving a fair and just consideration at the hands of impartial historians.

It cannot be regarded other than unfortunate, therefore, that this proposed woman's suffrage amendment, advocated with such zeal by so many honest and intelligent women of the land, should rest for its acceptance upon a precedent fraught with such unhappy consequences to the

country as the Fifteenth Amendment. Many regard a precedent as the conclusion of the argument for any proposition. Whether good or bad, it matters nothing, if only it be a precedent; when in fact, a precedent is oftentimes only a fulcrum without base or support which falls to pieces when the power of the lever is exerted to raise the object to public sight and popular approval. This proposed amendment, as we have seen, follows the language of the Fifteenth Amendment, substituting the word "sex" for the words "on account of race, color, or previous condition of servitude." If the proposition we have maintained, that the States alone possess the right of suffrage in the Constitution, the inquiry is pertinent why the United States are prohibited from denying the right of suffrage on account of sex. What power has the United States to deny a right which it does not possess? If suffrage rests alone with the States, for what reason are the United States prohibited from denying these rights? The Fifteenth Amendment which includes the words "by the United States or," when under discussion in the Senate

of the United States, was criticized for containing those words, and after an interesting debate, a motion was made to strike out the words "by the United States or." The motion was lost by a vote of yeas 18, nays 22.[1] It is seen that the vote was very close. Parties in the Senate were not so closely divided in that day as they are in ours, there being only ten or twelve Democrats in the body, and among the stalwart Republicans who voted to strike out these words we find the names of the following Senators: Roscoe Conkling (New York), Cragin, Doolittle, Ferry, Howard (Mich.), Patterson (N. H.), and Trumbull (Ill.). In the same debate[2] Senator Doolittle said that the adoption of this amendment meant Chinese suffrage by merely striking out the word "white" from the naturalization laws, and that Senator Sumner of Massachusetts had a bill prepared which he was going to introduce to accomplish this object. Senator Edmunds in the same debate justified

[1] 3d Sess., 40th Cong., Congressional *Globe*, Vol. II, p. 1304.

[2] *Id.*, p. 1305.

the use of the words "of the United States or" on the ground that while the States had the exclusive right of determining suffrage within their bounds, that the Government of the Territories had no such power, for they were subject to the laws of Congress, and that therefore the words "the United States or" should be inserted to give Congress the power to legislate on the subject in the Territories. This argument, however, did not appeal to his Republican colleagues, to whom we have referred above, for they voted to exclude the words.

On the motion to strike out the words "the United States or," Senator Trumbull of Illinois said:

"Unless something is to be accomplished by retaining those words, I think they had better be stricken out. According to my view, and the view I think of the Senate, the United States Government has no right to regulate suffrage at present."

And further he said, speaking of suffrage:

"The United States has nothing to do with it except in the Territories, as suggested, and over those we have plenary jurisdiction. It is not neces-

sary to put those words in in order to give the United States authority to control suffrage in the Territories. We have that authority and always have exercised it just as we do in the District of Columbia." [1]

[1] Cong. *Globe*, Part 2, 3d Sess., 40th Cong., 1868–1869, p. 1304.

CHAPTER V

MEANING OF LOCAL SELF-GOVERNMENT

IN the early days of the Republic when the Constitution was forming, no question enlisted more interest or created more antagonism to its adoption than the fear that the new government which was proposed would be dangerous to, if not destructive of, the local rights of the people in their States. The need of a stronger government for national purposes was felt by all; for the Confederation had proven itself powerless to deal with national issues. Our foreign relations and questions involving our safety in the defense and protection of the country, the regulations of commerce at home and abroad, a uniform revenue system enforceable by the Federal Government for the needs of that Government, were questions about which the people were practically united; and they desired that the new Government should

assume these powers and discharge them for the good of all. The opposition to the adoption of the Constitution in the States was due, in a small degree only, to jealousy of the incorporation of these powers in the Federal Government, but it was because of the fear, which was strong and pervasive from New Hampshire to Georgia, that the local affairs of the people as controlled by their State Governments might in some way be abridged by this new Constitution, or, by indirection, be covertly granted to the Federal Government and absorbed by it. It was this doubt on the part of the people of the country of the security of their local rights that caused the intense opposition to the Constitution in many of the States, and which resulted in the meager majorities for its adoption in some of them; and to this cause is also attributed the speedy adoption of the first ten amendments, which were really considered as conditions upon which the people of the States had ratified it. Justice Brewer has well stated the sentiment of the people in insisting upon the adoption of these amendments:

"The first ten amendments to the Constitution, adopted, as they were, soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights, the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property, which, by the Declaration of Independence, were affirmed to be unalienable rights."

Among these, the Tenth Amendment stands out pre-eminently as the one which was demanded by the States as a guarantee of the security of their rights under their State Governments which had not been granted to the Federal Government; it is in these words: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Their belief in the necessity of securing their local rights free from the control of the Federal Government was no vague theory of government without a substantial basis behind it. They felt that the people of New York could better determine for themselves

what was best for themselves in their everyday life, than could the people of South Carolina determine it for them.

This Saxon principle had been brought from the forests of Germany to England, and the mother-country has been enriched by the blood of our fathers spilled in its defense. Every consideration of climate and race, as well as religion and social habits, makes it clear that the people of each State should be permitted to control their local policies without interference from any other source. The nice adjustment of powers and duties under our Constitution has created a system of checks and balances which has been its chief glory, as well as its chief element of strength. In those matters in which all are equally interested, the Federal Government should act for all, but in matters in which each locality alone is interested, no outside power should be permitted to interfere. In National affairs we should be — we are — a unit; in local matters we represent forty-eight distinct and independent units, with laws, social customs, institutions, and religious affinities as distinct as

the billows of the sea. The strength of our Government from the beginning has been in the recognition of these two principles, each working in its own orbit, with no danger of collision as long as each confines itself to its legitimate and proper function.

The tenacity with which the people of the different States have clung to this theory of local self-government is not difficult to understand. It is not a mere pleasing theory of government; not a mere party shibboleth to be invoked when it can aid some pet scheme or repudiated when it is opposed to some pleasing popular movement, but it is founded upon a principle, the most perfect for securing the liberty of the citizen. The words "local self-government" are not, as is supposed by many, mere words to conjure with; oftentimes invoked by politicians, because of their hoary and honorable lineage, to lead the people into devious and slippery paths. These words had their origin in the profoundest political philosophy. They are the answer which free government makes to the oppressed. They are the response

that liberty makes to tyranny. They are the guaranty of the safety of the home, the recognition of the trusteeship of man as the defender of the home and the guardian of its sacred precincts. They single out the individual, arm him with the greatest political power that can possibly be given to an individual, and hold him responsible for its exercise in the development of home and neighborhood; and thus is demanded at his hands the exercise of the highest and most sacred duties that can ever be the portion of an American Citizen.

It will be admitted that the nearer the government comes to the man — the closer it touches him in his home life — in his varied everyday affairs — that there his power should be greatest for the protection of his home and his rights.

The National Government operating upon National affairs, such as our foreign policy, the regulation of commerce, the raising of armies and navies, etc., often, if not generally, touches the citizen only indirectly; but the laws that govern him in his State, in his county, in his magisterial district and in his city, are those

which affect him directly, and which touch him closest in his everyday life in innumerable ways. The right of a municipality to lay a pavement in front of the door of a citizen, to grade the streets, to lay sewers, water mains, gas pipes, and electric light poles at his doorstep, by which his property may be damaged and to that extent taken from him, are questions which bring the government to the very fireside of the man. And so a law applying to some one county alone, or to some one magisterial district in a county, taxing dogs, or requiring fences to be erected and maintained, or laying a special tax for roads, or schools, or for the suppression of the "coddling moth," by their operation bring the government much closer to the citizen than most laws involving national concerns emanating from the Federal Government. The tax on dogs, for instance, never fails to touch mankind in a tender spot, from the highest to the lowest, from the richest to the poorest. The stately spinster in the city, whose affections have never been wasted on a mere man, often gives freely of them to some pampered poodle,

nor can she understand why so many unleashed curs are allowed to throng the streets, distracting the attention of her little pet from his mistress, by angry barks, or friendly attentions. She thinks these dogs should be taxed out of existence. But what have their owners to say to this proposition? Has not one of them saved a child of the family when attacked by a drunken tramp? And has not another saved the home from robbery at dead of night by "watchful waiting"? Change the scene to the rural districts. Here the small farmer or the laborer, who toils from daylight to dark, who is denied many of the luxuries, and ofttimes even the necessaries of life, amid all of life's hardships and deprivations, feels there is one thing he must have, one thing he will have — he must have a dog, the companion of his joys, his sympathizing friend at all times, a never-failing admirer when all other friends have deserted and failed him. This dog, most likely, is not bred from an English kennel; his ancestry is probably enveloped in doubt. He is not comely or beautiful to look at. His body is gaunt, his

limbs are thin, his hair coarse and shaggy. No, he is not handsome! but the eye of the master sees a beauty there which is hidden from all others but himself. For who of the household shows more joy at his coming than he? and we all know "'Tis sweet to hear the watch-dog's honest bark bay deep-mouthed welcome as we draw near home." The demands of his affection, too, are not exacting. A friendly look now and then, a kindly word, and when the labors of the day are over and the family have gathered about the blazing fire for a short hour of social enjoyment, he only craves the privilege, the proud privilege, before the assembled family, of coming forward and resting his tired head on his master's knee and with "his sweet eyes slowly brightening close to his" he gathers comfort from his master's look. This is sufficient return for all the love and labor which he lavishes day by day upon his master. When that dog is touched by taxation, you touch the man himself. He has become a part of the master's life, if not of the man himself. So strong is this attachment that neighbors have been estranged, communities put

at loggerheads, the political complexion of counties changed — by dogs — and whether it be the government in the form of taxation, or an individual in resenting the actions of the animal, the result is the same; and it is this feeling, universal in mankind, that has found expression in the well-known maxim, "Love me, love my dog." The Federal Government may raise or lower the tariff to the master's disadvantage, but what cares he for this if only his dog is saved from taxation by the State? The one involves money, money only; the other the tenderest sentiments which bind him to life. As to the tariff as a citizen of the United States, his power to rectify it by his vote is weak and puny. As to the tax on his dog, his power as a citizen of his State or county or magisterial district (for the tax may be levied by either) is magnified and increased a thousandfold in the scale of descent from the Federal Government to that of the county or magisterial district. From this it is seen that the doctrine of local self-government gives the man his greatest power, for the nearer the government approaches

the man in State, county, or magisterial district, the stronger he is to control it and shape its policies. Fence laws, taxation for roads and schools, are all of a similar nature in their effect upon the citizen in his home and home life, and while affecting the local communities to which they apply with special directness, they affect the individual of the community more directly and personally than do the general laws of the State or Nation.

Take another example: the duty of the State to provide schools for its children, and the division of that duty between the State, the county, the magisterial district, or the ward of the city, by the very nature of its exercise, brings the government into the closest possible relationship with every family in the State. It is well recognized that the States and not the Federal Government control the education of the children of the country. Since no grant of power was ever given the Federal Government to control the education of the people, and since the Constitution does not prohibit this to the States, it is reserved to the States.

Perhaps no function of the government, among the many, reaches so closely to the people as that of the education of the children of the people. Every family is thereby personally affected in its domestic, intellectual, and religious life. When the school term begins the rising bell is rung a half-hour earlier, while breakfast in the household is moved forward and dinner moved backward to meet the demands of the regulations of the school. The older members of the family, father, mother, elder sister, or brother, as the shades of evening appear, are called upon to advise or assist in the solution of difficulties that have arisen in the lessons assigned for the next day. The moral and religious character of the teachers is of the first concern to the patrons of the school, demanding their closest examination and attention. The advance or the failure, the progress and the achievements, as well as every other step of the child in his school life, is the subject of daily discussion in every family. This is but the natural result of the relationship of every family of the neighborhood to the school system, to

the individual school, and to the teacher of that school. This important relationship of the man to his family, and the duty which he owes them, as well as his relations to the government, as the provider of the school, makes it necessary that he should be armed with the greatest power in making this system respond to the demands which an enlightened and Christian society has a right to expect. Taxation by the Federal Government may be inquisitorial and harsh, but that is as nothing compared with the inadequate intellectual development of the mind, or the destruction of the soul of his child under an improvident and insufficient school system at his door. Through the school system the government touches the man in his daily walks, at home, in the neighborhood, in the social circle, and in the church, and not once only, but every day in the year, and every hour in the day throughout the year.

Other examples might be given, but these are sufficient to show the meaning and the importance of the doctrine of local self-government, by which the man is armed with a power that

he can never attain as a citizen of the Nation for reasons which will be detailed hereafter.

So in the State, or in the county, or the magisterial district, or the ward of a city, while the general laws of the State, of course, affect every citizen therein, yet even those general laws of the State do not come as close to him as do the regulations of the local authorities of his own country, nor do the laws of the county affect him as closely as the laws which relate to his magisterial district or his municipal ward. In other words, the government of the magisterial district touches every citizen in the district closer than the government of the county in which he lives; the government of the county touches him closer than the government of the State in which he lives, and the government of the State in which he lives touches him closer than the Federal Government; and since this is true, the nearer the government approaches the man the greater power he should possess to protect his rights. The nearer the government comes to the home of the man, the greater power he should have to protect that home,

and therefore the basic reason of the jealousy for local self-government by the people is, that through it the individual man is armed with the greatest power where the government possesses the greatest power to harm or to benefit him.

The effect of this theory and its influence on the power of the citizen is thus clearly seen, for since the affairs that pertain to our everyday life, such as schools, roads, taxation, etc., are far more numerous in their number than those that affect us from a national point of view, the power of a citizen as a citizen of the State is much greater than as a citizen of the United States. It is easily seen, therefore, that whenever a power which rightfully belongs to the State is transferred to the Federal Government that the diminution of the power of the citizen of the State must result; and by just so much as these State powers are taken from the control of the State and put into the hands of the Federal Government, by just that much is the power of the citizen curtailed. The powers of the Federal Government which may affect a

citizen are few. They are limited by the Constitution, and, except the direct grants of power therein enumerated and those which necessarily flow from them as an incident of such power, the Federal Government has no power.

Article I, Section 8, of the Constitution gives Congress seventeen grants of power, and the section which follows includes the incidental grants; so that it is seen that the citizen is affected by but few powers of the Federal Government.

As a citizen of the State it is quite different, for all powers not granted to the Federal Government and not denied to the States in the Constitution remain with the States, respectively, or with the people, — that is, if the States have utilized these powers they still remain with them; if they are powers which have not been utilized and brought into active operation, they remain with the people. These powers of the States are necessarily innumerable and cannot be counted. They embrace every need, every want, every desire of the citizen in all the walks of life, in his social, political, and religious life.

Now since these powers which abide with the States, wherein the man is more powerful than as a citizen of the United States, are far more numerous than those which are granted to the Federal Government, their possession and retention clothe the citizen as a citizen of the State with vastly more power than he could possess were they transferred to the United States; and each power taken from the State and transferred to the Federal Government, to that extent weakens the citizen of the State, and as to that power taken weakens his influence in controlling the subject of such power in the proportion that the voters of his State bear to the number of voters in the United States. To illustrate: if a tariff law is proposed to the people of the United States containing 10,000,000 voters, each man's vote is as a unit and has the power of influencing the result as one in 10,000,000. If in a State containing 500,000 voters a law is proposed to be voted upon by the people of that State, each man's vote has the power to influence the result as one in 500,000. If a law be proposed for a county to be determined by the votes of that

county, containing, we will suppose, 1000 voters, his power in affecting the result is as one to one thousand. If a law is proposed in his magisterial district or the ward of his city containing 200 voters, there his influence will be as one to two hundred. It is seen, therefore, that under this theory the citizen is given the greatest power to influence the Government where that power is most needed — at his home — and that where it is least needed his power as a voter is weakest; and that proceeding from the Federal Government down to the ward of the city or the magisterial district, that just in proportion as government affects or touches the individual citizen, in that proportion the power of his vote is determined; that where he least needs it for protection — in the Federal Government — there his power is weakest; that where he most needs it for protection of home and fireside, in the ward or in the magisterial district, there his influence is greatest.

It must not be supposed from the above discussion that the Federal Government may not, by its laws, be brought as close to the

citizen as may the government of the State, county, magisterial district, or the ward of the city. The power of taxation, the power to regulate commerce, and the power to declare war, for example, may be felt at the fireside of the citizen in the diminution of home comforts, or in the value of farm products, by exorbitant freight rates, or in the absence of the father or brother from the family circle, called to defend his country by a declaration of war, but the number of subjects that the Federal Government can legislate upon is few and they are specified and limited in the Constitution, whereas the subjects that the State, county, district, or ward may regulate are unlimited and cannot be enumerated, for they embrace the innumerable needs and requirements of man in his everyday life, measured only by the scale of his civilization and his ambitions for self-development; and since the citizen's power is greater as a voter in a county than in the State, and the citizen of a State has likewise greater power as a voter than as the citizen of the Nation, that theory of government which leaves with the counties and

States the largest number of subjects for their legislation and disposition is the theory that gives to the individual the greatest power and is most conductive to liberty in the building up of a responsible electorate.

These examples are sufficient to show what is meant by the principle of local self-government; and the rights and powers involved therein are protected by the Tenth Amendment to the Constitution; and while the National powers, in which all the States are equally interested, are conferred upon the Federal Government, those rights which pertain to the citizen as a citizen of his State, his county, his magisterial district, or the ward of his city, are left to the administration of the State or its subordinate agency. No more efficient or beautiful system of government has ever been devised than this, and its preservation should be the study and hope of every patriot.

Article I, Section 8, of the Constitution enumerates in seventeen sections the powers of Congress; they are few in number; they are all national powers such as were deemed necessary

and sufficient for the proper and complete working of the Federal Government.

Section 10 of the same article then proceeds to put certain prohibitions upon the States, and then, to quiet all feeling of uncertainty of what the Constitution might mean, the Tenth Amendment was added, declaring that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."

With this clear and simple designation of the location of the different powers of government, under which each was to be supreme in its own sphere and powerless in that of the other, there was established an equilibrium of power which was designed to carry on the government without collision by its different depositories of power, and whenever the attempt is made by legislation or judicial decision to transfer the local powers of the States to the Federal Government, or the National powers of the Federal Government to the control of the States, the equilibrium is disturbed and the danger of the

destruction of the government in its original form is manifest.

Judge Cooley has well stated the relations of the State and the Federal Governments:

"To ascertain whether any power assumed by the Government of the United States is rightfully assumed, the Constitution is to be examined in order to see whether expressly or by fair implication the power has been granted, and if the grant does not appear, the assumption must be held unwarranted. To ascertain whether a State rightfully exercises a power, we have only to see whether by the Constitution of the United States it is conceded to the Union, or by that Constitution or that of the State prohibited to be exercised at all. The presumption must be that the State rightfully does what it assumes to do, until it is made to appear how, by constitutional concessions, it has divested itself of the power, or by its own Constitution has for the time rendered the exercise unwarrantable." [1]

The relation of the Federal Government to the States and of the States to the Federal Government has been expressed by Justice Brewer in a most powerful manner:

[1] Cooley's *Const. Law*, p. 31.

"Appreciating the force of this, counsel for the Government relies upon 'the doctrine of sovereign and inherent power,' adding, 'I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference.' His argument runs substantially along this line: All legislative power must be vested in either the State or the National Government; no legislative powers belong to a State government, other than those which affect solely the internal affairs of the State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly with the prescience of just such contention as the present, disclosed the widespread fear that the National Government

might, under the pressure *of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the Organic Act, and that, if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.*[1] It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to-wit: 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'we, the people of the United States,' not the people of one State, but the people of all the States, and the Tenth Amendment reserved to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the

[1] Author's italics.

Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

And he further says:

"From this and other declarations it is clear that the Constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted, yet while so construed it still is true that no independent and unmentioned power passes to the National

Government or can rightfully be exercised by the Congress." [1]

Mr. Jefferson, in a letter to William Johnson on the 12th of June, 1823, wrote as follows:

"The States supposed that by their Tenth Amendment they had secured themselves against constructive powers. They were not lessened yet by Cohen's case, nor aware of the slipperiness of the eels of the law. I ask for no straining of words against the General Government, nor yet against the States. I believe the States can best govern our home concerns, and the general government our foreign ones. I wish, therefore, to see maintained that wholesome distribution of powers established by the Constitution for the limitation of both; and never to see all offices transferred to Washington, where, further withdrawn from the eyes of the people, they may more secretly be bought and sold as at market." [2]

[1] *Kansas* v. *Colorado*, 206 U. S. 89–91, 51 L. Ed. 950, 27 S. C. 655.

[2] Authorities might be multiplied on this subject. The reader may be referred to the following cases sustaining this view:

Chief Justice Chase, in *Lane Co.* v. *Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101.

Chief Justice Taney in *Gordon* v. *U. S.*, 117 U. S. 697, 705, 29 L. Ed. 921.

Perhaps nowhere in America in any of the States has this principle of local self-government been more strongly emphasized or more effectively worked out than in New England. The "town meeting" is a part of the institutional liberty of the New England people. It is rooted in the very soil, and any attempt to change this system would meet with stubborn resistance. The power of taxation, the most dangerous, the most powerful of all the powers of government, is there wielded by the people themselves, far from the gilded halls of the State capitols, and removed from the seats of justice of each county of the State. Here the taxation of the vicinage with due regard to its needs, under this system, is imposed not mediately but immediately by those for whom the levy is made. In the New

Justice Nelson in *Collector* v. *Day*, 11 Wall. 113, 124, 20 L. Ed. 122.

Willoughby on the Constitution, Vol. 1, p. 66.

Judge Story in *Martin* v. *Hunter*, 1 Wheat. 325.

Gibbons v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23.

Mr. Madison in the 39th number of the *Federalist*.

Justice Brewer in *South Carolina* v. *U. S.*, 199 U. S. 447, 448, 50 L. Ed. 261, 26 S. C. 110.

Justice Harlan in *House* v. *Mayes*, 219 U. S. 281, 55 L. Ed. 213, 31 S. C. 234.

England town meeting, one hundred, two hundred, five hundred citizens may meet, each entitled to a vote, and the power of the man in controlling the rate of taxation levied upon his own property is as one to one hundred, one to two hundred, one to five hundred, as the case may be. If in the less fortunate States where this right of taxation of the localities has been delegated either to State or county authority, the power of the vote of the individual to control and direct his representative who imposes the tax is weakened in the proportion as the number of citizens of the town meeting bears to the number of inhabitants of the State or county. The doctrine of Secession first suggested by New England in the Hartford Convention and afterwards practically carried out by the Southern States, was submitted to the arbitrament of arms and decided against the South, and in many minds this has served to place all questions of the rights of the States and of local self-government in the same category as that of secession, and with the thoughtless it is quite common, when this doctrine stands

in the way of their proposed measures, to say that it is but another evidence and claim of the right of secession, which "was shot to death at Appomattox." Fortunately for those who believe in our constitutional system, the Supreme Court has with unvarying judgments upheld the faith once delivered to the fathers, and while reprobating the act of secession by the States that attempted it, they have declared with emphasis that neither the war which decided that question nor the Amendments to the Constitution following the war have made any material change in the fundamental principles of our Constitution, except as hereafter stated.

An illustration of the attempt to enlarge Federal power may be seen in the effort to bring about a uniform divorce law in the United States by act of Congress. The inadequacy or laxity of the laws of certain States of the Union and the facility with which divorces may be granted therein have induced some to strive to remedy the evil by having Congress take charge of the whole subject. A slight examination of the Constitution will show that no such power

has ever been granted Congress. The American home is the source from which springs American power. Break it up, either by the separation of husband and wife or otherwise, and it no longer remains as a spring from which must flow the life-giving waters to American civilization. The laws which control divorce are State laws. Law is but the means or process by which the customs, the habits, and the activities of a people are made fixed and secure. As the common law of England is said to have been but a bundle of customs, so any law may be said to be only the tie that binds the habits and customs of a people into a fixed rule. In a great country like ours, these customs and habits of the people vary considerably and differ widely in different parts of the country, and the attempt to transfer to the Federal Government the right to control marriage and divorce and all the legal consequences of each, would result in confusion and turbulence from the time of its adoption. Not only would such jurisdiction have to consider the right of whites and blacks, Caucasians and Asiatics, to marry, but questions of the rights

of the parties on the dissolution of the marriage would be taken from the locality where they had arisen to a distant field (and all be dumped into the Federal hopper), to be determined by those whose sympathy and knowledge of local conditions would make them less capable of judging wisely the results.

A strong side-light may be thrown upon this subject by reference to the history of the committee on Uniform State Laws of the American Bar Association, which has been in existence now for some twenty-four years. Among the members of the Association for years there has been a feeling that there are certain principles so well settled in certain branches of the law that their application to the people of all the States uniformly would be wise and proper, and therefore their work has been largely directed toward the study of those laws of the States that might be subject to unification. Of course only those would be considered that contained the same principle in each and where it was found that only slight variations in unimportant forms existed. The Negotiable Instruments

Law, which is a distinct, technical branch of the law as applied to the law merchant, recommended to all the States by the Association some years ago, has been adopted substantially by every State in the Union; while the Warehouse Receipts Law has been adopted in probably half of the States; and the work of this committee has resulted in their recommending about eleven laws to be adopted by all of the States. They have taken subjects technical in their nature and that have a distinct and independent character, and which, generally speaking, are not controlled by, or subject to, variation by racial, social, or economic considerations, and which all Americans, wherever situated, would probably desire to be uniform. But this committee has not appealed to Congress to pass a uniform Negotiable Instrument Law (as that is a subject not given to Congress by the Constitution), that they might accomplish at one stroke what it has taken forty-eight distinct efforts to bring about, for they knew that Congress had no power to legislate on the subject. Nor have they, to shorten their work, applied to Congress

and the States for an Amendment to the Constitution to effectuate the Negotiable Instruments Act in all the States without the trouble of going to every State for its action. This of course is due to the fact that the lawyers of the country understand the nature of our Government better than others because they are obliged to be students of Constitutional Law, and are unwilling, for the sake of obtaining uniformity in legislation, to attempt to break down the proper limits between Federal and State powers. The line of cleavage between the power of the Federal Government and the States has been frequently pointed out in the decisions of the Courts, as well as in the Constitutional literature of the country.

Justice Miller, in the Slaughter-House Cases, in speaking of Section 2 of Article IV of the Constitution, which declares "citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," says:

"It would be the vainest show of learning to attempt to prove by citations of authority, that up

to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States — such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress when-

ever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction, followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of

both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

". . . . We do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights — the rights of person and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation."

An eminent New England writer, speaking of the fears of the members of the Federal Convention in the adoption of the Constitution, says:

"To the familiar State governments which had so long possessed their love and allegiance, it was superadding a new and untried government, which it was feared would swallow up the States and everywhere extinguish local independence. Nor can it be said that such fears were unreasonable.

"Our federal government had indeed shown a strong tendency to encroach upon the province of the State Governments, especially since the Civil War. Too much centralization is our danger to-day, as the weakness of the Federal tie was our danger a century ago. . . . If the day should ever arrive (which God forbid) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington and when the self-government of the States shall have been so far lost as that of the departments of France or even so far as that of the counties of England, — on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever."[1]

The New York *Times*, in its leading editorial of April 4, 1915, says:

"Not through generous emotions and magnanimity, but from considerations that profoundly concern our future social and political welfare, we may now feel and say that some of the living ideas for which the people of the South took up arms are worthy of our present attention. The fiftieth anniversary of

[1] Fiske, *Critical Period of American History*, 237.

peace is a fitting time to recall them to the minds of men. Just as the vital principles of English liberty found their support and continuance not at the hands of the Government of George III, but in the revolt of the American colonies, so we may feel that doctrines held dear by the statesmen of the South — doctrines which suffered a great decline, but not death, since they are and should be imperishable — through the loss of the cause of which they were a part, might now, to our manifest and great advantage, be revivified and restored to their place in our political creed. The doctrine of States' rights was conspicuously, but not exclusively, an article of Southern faith. Naturally somewhat in abeyance and asserted with fainter emphasis in the generation following the close of the war, it has in these later times come to be overslaughed and well-nigh forgotten, not through mere neglect, but because of the rise into a position of dominance of a very positive and directly contrary belief and practice."

Justice Charles E. Hughes of the Supreme Court of the United States, in an address before the New York Bar Association on the 12th of January, 1916, said:

"An over-centralized Government would break down of its own weight. It is almost impossible

even now for Congress in well-nigh continuous session to keep up with its duties, and we can readily imagine what the future may have in store in legislative concerns. If there were centered in Washington a single source of authority from which proceeded all the governmental forces of the country — created and subject to change at its will — upon whose permission all legislative and administrative action depended throughout the length and breadth of the land, I think we should swiftly demand and set up a different system. If we did not have States we should speedily have to create them. We now have them, with the advantages of historic background, and in meeting the serious questions of local administration we at least have the advantage of ineradicable sentiment and cherished traditions. And we may well congratulate ourselves that the circumstances of the formation of a more perfect Union has given us neither a confederation of States, nor a single centralized Government, but a nation — and yet a Union of States each autonomous in its local concerns. To preserve the essential elements of this system, without permitting necessary local autonomy to be destroyed by the unwarranted assertion of Federal power, and without allowing State action to throw out of gear the requisite machinery for unity of control in national concerns, demands the

most intelligent appreciation of all the facts of our interrelated affairs and far more careful efforts in co-operation than we have hitherto put forth."

Justice Hughes' views coincide very strikingly with those of Mr. Jefferson as shown in his autobiography:

"It is not by the consolidation or concentration of powers, but by their distribution, that good government is effected. Were not this country already divided into States, that division must be made that each might do for itself what concerns itself directly, and what it can so much better do than a distant authority. Every State is again divided into Counties, each to take care of what lies within its local bounds; each county again into townships or wards, to manage minuter details; and every ward into farms, to be governed each by its individual proprietor. Were we directed from Washington when to sow and when to reap we should soon want bread. It is by this partition of cares, descending in gradation from general to particular, that the mass of human affairs may be best managed for the good and prosperity of all."

CHAPTER VI

FEDERAL AND STATE GOVERNMENTS

IN the last chapter the meaning of local self-government was under consideration, and the attempt was made to show that the Constitution of the United States, by its division of National and local or state powers between the Federal and State Governments, has established a just relation of powers, the one to the other, which if preserved, as intended by the framers of that instrument, would, like the operation of the centrifugal and centripetal forces in nature, mutually operate upon each other in preserving successfully the functions and movements of each. The Secession of the Southern States was an example of the unrestrained effect of the centrifugal force in government. The unrestrained centripetal force drawing all power to one central government would be no less disastrous to our system than was the act of secession. It is the harmony of the two forces,

exerted mutually upon each other, that eliminates the danger of each, and creates a resultant as happy in its results as is witnessed in the harmony of the universe in which we live.

The proposed amendment produces a radical organic change in the Constitution. During the one hundred and twenty-six years of our government under the Constitution there has been no organic change in the Constitution by amendment, except in the *post bellum* amendments, and these were the result of revolution. Except the Thirteenth, Fourteenth and Fifteenth Amendments which were brought about by the results of the war, the only amendments we have had to the Constitution, except the first eleven, which are regarded practically as parts of the original instrument, are the Twelfth, Sixteenth, and Seventeenth.

The Twelfth Amendment was brought about in 1804 by the Presidential election of 1800, in which Mr. Jefferson and Mr. Burr each received a majority of the electoral votes of the Electoral College and each the same number of votes. Under the original Constitution under which

this election was held, the Electors could vote for two persons without indicating which was their choice for President, and which for Vice-President. The amendment changed this so that the elector in voting should indicate his choice for President and his choice for Vice-President. It made no fundamental organic change in the Constitution.

The Thirteenth, Fourteenth and Fifteenth Amendments did make organic changes in the Constitution, but it is no less true that they were the results of the war between the States.

The Sixteenth Amendment declares, "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." This amendment does not grant an original power to Congress to lay and collect taxes; that is conferred in Article I, Section 8, though incomes are not enumerated there. But since the question of the right to tax incomes had been before the Supreme Court from the

time that *Hylton* v. *U. S.*[1] (1798) was decided down to *Pollock* v. *Farmers' Loan & Trust Co.*,[2] and had been decided both in favor of and against the right, the amendment was adopted that the question might be forever settled. The amendment is to be regarded merely as declaratory of the power of Congress which existed under the original Constitution, for the court had reversed itself on this question.

The Seventeenth Amendment merely changes the mode of electing Senators by the Legislature and gives the power to the people. The Senators who were originally intended to represent the States in their sovereignty are by this amendment elected by the only sovereign power in the State. The Senators now as formerly represent the States — the mode of election alone is changed. Thus it is seen that except the *post bellum* amendments — and they are the outcome of revolution — no amendment has been made to the Constitution that has changed

[1] 3 Dall. 171; 1 L. Ed. 556.

[2] 157 U. S. 429; 15 Sup. Ct. Rep. 673; 39 L. Ed. 759. Also 158 *Id.*, 601; 15 Sup. Ct. Rep. 912; 39 L. Ed. 1108.

its organic functions, or has taken from the States any of those powers originally given to or allowed to remain with the States so necessary for the protection of the local affairs of the people and the proper development of the States.

This principle of local self-government has been extended in the States in a most interesting manner. Many of our States are so large, and conditions are so diverse, that many of them have found that the passage of general laws would operate as a great injury to some localities in the State, and therefore it has resulted in the State enacting laws permitting counties or magisterial districts or municipalities, *at their option*, to adopt certain laws, thereby enabling one portion of the State to which such laws would be of advantage to adopt them if they pleased, leaving other parts of the State where their adoption would be injurious free to reject them. For example, a State may be so large as to contain within its boundaries the rich blue-grass land of the mountain section, and also an area adjacent to the seashore where the

heat of the sun and climatic conditions are fatal to the production of blue grass or indeed of any sort of grass to any extent. The blue-grass region naturally abounds in cattle, and cattle must be fenced in. In the tidewater section of the State where there are but few cattle, no fences are needed, and therefore the States frequently pass laws permitting the separate counties of the State, and in some cases the separate magisterial districts, to adopt by their votes a fence law. This is both just and reasonable, for why should the needs of the blue-grass section, where fences are absolutely necessary, compel the expense of fences to the inhabitants of the tidewater section and the additional burden such fences would entail upon the people where they are not needed. In many of the States of the Union, therefore, we find these local option fence laws, founded upon reason and justice, and giving to the people of each locality the right of determining such laws for themselves, without the interference of those who have no interest in them. On the same principle we have the local fish laws, the law

applying differently to different species of fish. A State with mountain streams on one side and the ocean on the other, whose inhabitants for their perpetuation and increase may demand and require different treatment, frequently, if not always, make the open and closed seasons different for each species of fish. And so in parts of a State where sheep abound, those communities are often given the right locally to levy taxes on dogs for the protection of the sheep, while counties which cannot and do not raise sheep are not forced to the necessity of legislating on the subject, or forced to give up the comfort and pleasure that comes from having a dog around the house.

Innumerable instances could be given of this principle, for in many of the States local option fence laws, local option dog laws, local option road laws, local option liquor laws, local option compulsory education laws, have been put upon the statute books in recognition of the fact that on these varied subjects (and there are many others), what may be peculiarly advantageous for the people of one locality of the State

may not be suited to people of another locality, and therefore those to whom it would not be of advantage to have such laws are not forced by a State-wide law to be subject to laws that would be of no advantage, or a distinct disadvantage, to them; and conversely they are excluded, from this same lack of interest in the subject, from any power to influence the decision of the localities that are interested in such laws.

This principle is seen again in the government of our cities. They are not governed at the Capitols of our States by the Legislatures. General laws for the government of cities are passed by the Legislatures, but when organized under such laws, the control of municipal rights is left in the city governments, where the citizen's power as a voter is greater than as a citizen of the State. The fight of the great cities throughout the country for independent control of their own affairs has been largely won, and seems likely to become a permanent principle in our system of government.

This is not a modern principle. It is not a principle evolved for the determination of any

one question, but it is a principle as old as the Anglo-Saxon race from which we sprung, which is embodied in its institutions as a bulwark of liberty and a defense against tyranny.

Having shown that the right of suffrage under the Constitution is a right belonging to the States, and that the proposed amendment would take away such right from the States and thus destroy to the extent of this amendment the equilibrium between the States and the Federal Government as originally designed, the advocates of the amendment, while generally admitting these facts and many of them declaring that they believe the principle of local self-government should be preserved, speciously claim that this one act in taking this one power from the States, just as the Fifteenth Amendment took only one from them, would not seriously impair the just relations between the Federal Government and the States; that with all the innumerable rights which are still residing with the States, that the taking of this one alone would have but slight if any influence in destroying the well-established lines that divide the Federal

and State Governments. "One swallow," it is said, "does not make a summer," and this is true. But when this maxim was suggested to Pat by a friend who was discussing some question with him, with the quick wit of his race he declared, "True it is, but *one* swallow makes you want another." And this is especially true in a government like ours. If one small break in the Constitutional wall can be made, it makes it much easier for the next assailant to enlarge the opening. One bad precedent may be relied upon as the basis for innumerable dangerous and unconstitutional enactments. The courts may be relied upon to set aside unconstitutional laws, but legal ingenuity may often thwart the keenest critical dissection by the courts. The attempts that have been made from time to time to break down the wall of partition that divides Federal and State power call for determined and resolute resistance by all lovers of our Constitutional Government, and these should make us more critical in the future in the examination of all Federal legislation. A few illustrations of these attempts may be given: No principle is more

firmly established than that under our system of government the taxing power of the government can be used only for public purposes. A tax is the enforced contribution by government from every citizen of a part of his or her property for public purposes. It can be justified on no other principle, for if the government under which we live can by its unlimited taxing power compel you to give up a part of your property for any other purpose than a public purpose, it is an act of tyranny. Judge Miller[1] has well stated the principle as follows:

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals, to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

A bill introduced into Congress may in form be a tax bill, for the purpose of raising revenue; in substance its provisions may make revenue under it an impossibility. Some years ago it

[1] *Loan Association* v. *Topeka*, 12 Wall. 581.

was found that lard made from cottonseed, a wholesome and pure article of food, though perhaps not so valuable a food product as the lard produced from the hog, was threatening to take the market from the hog-lard producers. An innocent little bill was thereupon introduced into Congress at a time when the treasury was full and needed not to be replenished, that provided a tax of two or three cents per pound on the cottonseed lard. The bill did not pass, but it produced a great fight and the exposure of the purposes of the bill resulted in its defeat. If one of two competitors for the sale of similar articles, finding the market slipping from him, can save his failing business by securing the support of the Federal Government to tax his competitor out of existence, then indeed is government a sham and our boasted equality before the law a falsehood.

It has been well settled always that among the duties and rights which pertain to the States of the Union is that of undertaking and controlling the education of the children of the State; and perhaps the wisdom of the founders of the

Constitution has been shown in no greater degree than in leaving this important domestic duty in the hands of the government which is closest to those whom it affects, and yet we have recently seen the claim asserted by some high in authority that a treaty between this country and Japan giving "the rights of residence" to the Japanese in America carries with it the right of Japanese children to enter the schools of a State contrary to the law of the State.[1]

One of the most interesting discussions that engaged the attention of the early statesmen of the country, involving a conflict between State and Federal power, was the power of Congress to appropriate money for internal improvements.[2]

In 1817, President Monroe, in his annual message, denied the constitutionality of such legislation, but recommended an amendment to

[1] See *Limitations on the Treaty-making Power*, Chap. XII, H. St.G. Tucker.

[2] The Cumberland Road Bill (Annals of Congress, 1805–06, pp. 22, 25, 43, 835–837, 840) was one of the first bills of that character brought before Congress and the question was before the public in different forms for many years.

the Constitution allowing such. That portion of his message was referred to a special committee of the House, of which Judge Henry St.George Tucker, of Virginia, was chairman.

The report[1] sustained the following propositions:

"That Congress has the power — 1. To lay out, improve, and construct post roads through the several States, with the assent of the respective States; and, 2. to open, construct, and improve military roads through the several States, with the assent of the respective States. 3. To cut canals through the several States, with their assent, for promoting and giving security to internal commerce, and for the more safe and economical transportation of military stores, etc., in time of war; leaving in all these cases the jurisdictional right over the soil in the respective States" (p. 458);

and on March 10, 1818, as a result of this report, the following resolutions were adopted by the Committee of the Whole House on the State of the Union:

"Resolved, That Congress has power, under the Constitution, to appropriate money for the construc-

[1] Annals of Congress, pp. 451–460.

tion of post roads, military and other roads, and of canals, and for the improvement of water courses. (Ayes 78, noes 58)

"Resolved, That Congress has power, under the Constitution, to construct post roads and military roads; provided that private property be not taken for public use without just compensation. (Ayes 76, Noes 70)

"Resolved, That Congress has power, under the Constitution, to construct roads and canals necessary for commerce between the States; provided that private property be not taken for public purposes without just compensation. (Ayes 70, noes 69)

"Resolved, That Congress has power, under the Constitution, to construct canals for military purposes; provided that no private property be taken for any such purpose without just compensation being made therefor. (Ayes 75, noes 63)."

When these resolutions were brought into the House on March 14, the first was adopted by a vote of 90 to 75; the second was defeated by a vote of 82 to 84; the third was defeated by a vote of 71 to 95; the fourth was defeated by a vote of 81 to 83. [1]

Judge Tucker sent his report to Mr. Madison

[1] Annals of Congress, pp. 1385–1389.

for his inspection. I have in my possession the reply of Mr. Madison, which is as follows:

"MONTPELLIER, Dec. 23, 1817.

"*Dear Sir:* I have recd your favor of the 18th inclosing the Report on the question of roads and canals.

"I respect too much the right and the duty of the Representatives of the people to examine for themselves the merits of all questions before them; and am too conscious of my own fallibility, to view the most rigid and critical examination of the particular question referred to your Committee, without any other feeling than a solicitude for a result favorable to truth and the public good.

"I am not unaware that my belief, not to say knowledge of the views of those who proposed the Constitution, and what is of more importance, my deep impression of the views of those who bestowed on it the stamp of authority, may influence my interpretation of the Instrument. On the other hand, it is not impossible that those who consult the Instrument without danger of that bias, may be exposed to an equal one, in the anxiety to find in its text an authority for a particular measure of great apparent utility.

"I must pray you, my dear Sir, to be assured that altho I cannot concur in the latitude of construction taken in the Report, or in the principle that the con-

sent of States, even of a single one, can enlarge the jurisdiction of the General Government, or in the force and extent allowed to precedents and analogies introduced into the report, I do not permit this difference of opinion to diminish my esteem for the talents, or my confidence in the motives, of its author. I am far more disposed to acknowledge my thankfulness for the polite attention shown in forwarding the document, and for the friendly expressions which accompanied it. Be pleased to accept a sincere return of them.

"JAMES MADISON.

"H. St.G. Tucker."

The "precedents and analogies" referred to by Mr. Madison in his letter, contained in the report, were as follows:

"The laws giving bounties to fishermen; encouraging manufactures; establishing trading houses with the Indians; erecting and constructing beacons, piers and light-houses; purchasing libraries; adorning with paintings the Chamber of Congress; giving charity to suffering foreigners; constructing roads through the different States, and establishing banks."

The growth and development of this question is one of very great interest. On May 4, 1822, President Monroe vetoed a bill for the mainte-

nance and operation of one of these roads. President Madison, on March 3, 1817, had vetoed the Bank Bonus Bill, embracing a similar subject. To the student who may desire to follow this subject, references will be found in a note, for his guidance, to the most important discussions of the subject.[1]

The Supreme Court has passed upon this question quite frequently. In the case of *California* v. *Pacific Railroad Co.*,[2] Mr. Justice Bradley, speaking for the court, said:

[1] Mr. Calhoun's speech, February 4, 1817, on the Bank Bonus Bill (2 *Works of Calhoun*, 186); President Jackson's veto of the Maysville Road Bill (Richardson's *Messages and Papers of the Presidents*, Vol. 2, p. 483); President Monroe's veto message, 1822 (Richardson's *Messages and Papers of the Presidents*, Vol. 2, p. 142); 2 Stat. U. S. 357; President Jefferson's message to Congress, November 8, 1808 (Richardson's *Messages and Papers of the Presidents*, Vol. 1, p. 451); Annals of Congress, 1810, pp. 522, 613, 1385–1401, 140 *Id.*, December 4, 1809, p. 690; *Id.*, February 6, 1910, p. 1378; Annals of Congress, March 5, 1807, p. 537, *Id.*, January 15, 1807, p. 33; February 7, 1807, pp. 58–59; Annals of Congress, January 12, 1811, p. 94; Annual Messages of President Madison, 1815 and 1816 (Richardson's *Messages and Papers of the Presidents*, Vol. 1, p. 562, and Vol. 1, p. 573); Annals of Congress, December 16, 1816, p. 296; Annals of Congress, February 4 and 6, 1817, pp. 858–859, and pp. 886, 891 and 894, 934.

[2] 127 U. S. 39.

"It can not at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct or to authorize corporations or individuals to construct national highways and bridges from State to State is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States

and its power to grant franchises exercisable therein are and ever have been undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as Federal corporations." [1]

A son of New Haven, a learned lawyer in his day, and a distinguished alumnus of Yale University, who reflected honor upon his alma mater, the late Edward B. Whitney, has contributed an interesting and able discussion to this subject, in a brief filed by him in the Supreme Court of the United States, in the *Sugar Bounty* cases.[2]

If our government under the Constitution is, as we boastfully claim, the most perfect and the best suited for working out the principles of civil liberty, combining, as it does, the elements

[1] See *Pacific Railroad Removal Cases*, 115 U. S. 1, 14, 18; *Cherokee Nation* v. *Kansas Ry. Co.*, 135 U. S. 641; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288, 295.

[2] *United States* v. *Gay*, 163 U. S. 427.

of power in the National Government to defend us from foreign aggression and to develop the unity of the whole people in all directions in which they have a common interest, while leaving to the individual in his State, his county, and his neighborhood the maximum of power where most needed to protect and develop his local interests, then every move which has for its object the breaking down of this relationship should meet with the determined opposition of all lovers of our country. *Obsta principiis* should be our maxim. Governments rarely fall in a day; rarely indeed are they engulfed by some sudden cataclysm, but the slow processes of disintegration which have marked the downfall of Nations in the past should serve to warn us that our safety lies in resisting the very beginnings of evil and in refusing to listen to the voice of sophistry and subtlety as it seeks to lead us into questionable paths untrodden by the fathers, forbidden by the Constitution, and which can only result in dissolution and change, if long persisted in.

The students of government and the en-

lightened citizenship of America need not fear that one unconstitutional law that has escaped destruction at the hands of the Supreme Court will ever break down our government. The danger is not there; but they cannot fail to discern in the many schemes that are brought forward by this progressive people invoking the aid of the Federal Government for the accomplishment of their purposes when no such power exists in that government, an open and obvious danger to our institutions. This danger is enhanced by the infusion into our population year by year of millions of foreigners, strangers to our system of government and often ignorant of the differences between State and Federal control in their application to the problems of life.

The foregoing views have the sanction of statesmen, authors, and judges. The views of some of them may be read with profit, for they show not only the line of demarcation between Federal and State power, but in many cases give the reasons for such division of powers.

Chief Justice Chase in *Texas* v. *White*,[1] in memorable language, says:

"Not only, therefore, can there be no loss of the separate and individual autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible States."

Justice Brewer,[2] in the case of *Turner* v. *Williams*, says:

"While undoubtedly the United States as a Nation has all the powers which inhere in any Nation, Congress is not authorized in all things to act for the Nation, and too little effect has been given to the Tenth Article of the Amendments to the Constitution. . . . The powers the people have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grant from them."

[1] 7 Wallace, 725.

[2] 194 U. S. 295–297, 48 L. Ed. 979, 24 S. C. 719.

Chief Justice Chase, in *Lane County* v. *Oregon*,[1] uses this striking language:

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved."

Chief Justice Taney, in *Gordon* v. *United States*,[2] said:

"By the Tenth Amendment the powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people. The reservation to the States respectively can only mean the reservation of the rights of sovereignty which they respectively possessed

[1] 7 Wall. 71–76, 19 L. Ed. 101.
[2] 117 U. S. 697–705, 29 L. Ed. 921.

before the adoption of the Constitution of the United States, and which they had not parted from by that instrument. And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so."

In *Collector* v. *Day*,[1] Justice Nelson uses this language:

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the state governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments. . . . The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. The general government, and the States, although both exist within the same

[1] 11 Wall. 113–124, 20 L. Ed. 122.

territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

Judge Marshall, in *McCulloch* v. *State of Maryland*,[1] says:

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

President Andrew Johnson, on the 27th of March, 1866, in giving his reasons for refusing to sign the Civil Rights Bill, which attempted to put under the control of the Federal Government certain rights which had always been

[1] 4 Wheaton, 316, 4 L. Ed. 579.

recognized as those belonging to the States, among other things, said:

"The first section of the bill also contains an enumeration of the rights to be enjoyed by these classes so made citizens 'in every State and Territory in the United States.' These rights are 'to make and enforce contracts; to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property,' and to have 'full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens.' So, too, they are made subject to the same punishment, pains, and penalties in common with white citizens, and to none other. Thus a perfect equality of the white and colored races is attempted to be fixed by Federal law in every State of the Union over the vast field of State jurisdiction covered by these enumerated rights. In no one of these can any State ever exercise any power of discrimination between the different races. In the exercise of State policy over matters exclusively affecting the people of each State it has frequently been thought expedient to discriminate between the two races. By the statutes of some of the States, Northern as well as Southern, it is enacted, for instance, that no white person shall intermarry with a negro or mulatto. Chancellor Kent says, speaking of blacks, that —

"'Marriages between them and the whites are forbidden in some of the States where slavery does not exist, and they are prohibited in all the slave-holding States; and when not absolutely contrary to law, they are revolting, and regarded as an offense against public decorum.'

"I do not say that this bill repeals State laws on the subject of marriage between the two races, for as the whites are forbidden to intermarry with the blacks, the blacks can only make such contracts as the whites themselves are allowed to make, and therefore cannot under this bill enter into the marriage contract with the whites. I cite this discrimination, however, as an instance of the state policy as to discrimination, and to inquire whether if Congress can abrogate all state laws of discrimination between the two races in the matter of real estate, of suits, and of contracts generally Congress may not also repeal the state laws as to the contract of marriage between the two races. Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the states. They all relate to the internal police and economy of the respective States. They are matters which in each State concern the domestic condition of its people, varying in each according to its own peculiar circumstances and the safety and

well-being of its own citizens. I do not mean to say that upon all these subjects there are not Federal restraints — as for instance, in the state power of legislation over contracts there is a Federal limitation that no State shall pass a law impairing the obligations of contracts; and, as to crimes, that no state shall pass an *ex post facto* law; and, as to money, that no State shall make anything but gold and silver a legal tender; but where can we find a Federal prohibition against the power of any State to discriminate, as do most of them, between aliens and citizens, between artificial persons, called corporations, and natural persons, in the right to hold real estate? If it be granted that Congress can repeal all state laws discriminating between whites and blacks in the subjects covered by this bill, why, it may be asked, may not Congress repeal in the same way all state laws discriminating between the two races on the subjects of suffrage and office? If Congress can declare by law who shall hold lands, who shall testify, who shall have capacity to make a contract in a State, then Congress can by law also declare who, without regard to color or race, shall have the right to sit as a juror or as a judge, to have any office, and, finally, to vote 'in every State and Territory of the United States.' As respects the Territories, they come within the power of Congress, for as to

them the lawmaking power is the Federal power; but as to the States no similar provision exists vesting in Congress the power 'to make rules and regulations' for them.

"In all our history, in all our experience as a people living under Federal and state law, no system as that contemplated by the details of this bill has ever before been proposed or adopted. They establish for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race; in fact, the distinction of race and color is by the bill made to operate in favor of the colored and against the white race. They interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between inhabitants of the same State — an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the States. It is another step, or rather stride, toward centralization and the concentration of all legislative powers in the National Government."[1]

[1] *Messages and Papers of the President*, Richardson, Vol. 6, pp. 407–408, pp. 412–413.

The Supreme Court in the case of *United States* v. *DeWitt*,[1] held that a law of Congress making it a misdemeanor "to mix for sale naphtha and illuminating oils, or to sell petroleum inflammable at less than a prescribed temperature," was unconstitutional and void. The decision was clearly right, for no clause of the Constitution could be found which could give the right to Congress to legislate on this subject, simply because it was a subject that needed regulation and the States had failed to act: and if power could not be found in the Constitution, however great the necessity, Congress could not act and it must be left to the States for their legislation, for, as Judge Story has well said —[2]

"Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry, whether it is properly an incident to an expressed power and necessary to its execution. If it be, then it may be

[1] 9 Wallace, 41, 19 L. Ed. 593.

[2] Story on the Constitution, Sec. 1243.

exercised by Congress. If not, Congress cannot exercise it."

Chief Justice Chase delivering the opinion of the court in the case of *United States* v. *DeWitt*, says:

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."

An interesting illustration of this principle is found in the *Civil Rights* Cases.[1]

Congress had passed an act known as the Civil Rights Act, March 1, 1875, entitled "An Act to protect all citizens in their civil and local rights." The first section of this act was as follows:

[1] 109 U. S. 4.

Section 1. "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

Section 2 provided punishment for the violation of this provision and allowed the recovery by suit by the aggrieved party of certain specified sums. These cases embraced indictments against persons for denying to persons of color accommodations in a hotel and in refusing a colored person a seat in the dress circle of a theater, etc., etc. This Civil Rights Act was passed supposedly to carry out the Fourteenth Amendment, the first section of which is as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Judge Bradley, in his opinion, says:

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. . . .

"And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of the citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceedings under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against and

that is, State laws, or State action of some kind, adverse to the rights of the citizens secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. *It would be to make Congress take the place of the State Legislatures and supersede them.* It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that because the denial by a State to any persons of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizens, but corrective legislation, that is, such laws as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which by the amendment they are prohibited from making or enforcing, or such acts and proceedings as the States may commit

or take, and which, by the amendment, they are prohibited from committing or taking. . . .

"If this legislation is appropriate for enforcing the prohibitions of the Amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property? If it is supposable that the States may deprive persons of life, liberty and property without due process of law (and the amendment itself does not suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances and theaters. The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor

prohibited by it to the States, are reserved to the States respectively or to the people."

The reader who desires to follow up this discussion will find ample opportunity for doing so by referring to the cases on this subject.[1]

[1] *U. S.* v. *Harris*, 106 U. S. 629.
Presser v. *Illinois*, 116 U. S. 252.
U. S. v. *Cruikshank*, 92 *Id.*, 549.
In re Kemmler, 136 *Id.*, 436.
Barbier v. *Connally*, 113 *Id.*, 31.
Crowley v. *Christensen*, 137 *Id.*, 86.
Williams v. *Mississippi*, 170 *Id.*, 213.
Spies v. *Illinois*, 123 *Id.*, 131.
Holden v. *Hanry*, 168 *Id.*, 366.

APPENDIX

MINOR v. HAPPERSETT [1]

IN this case the question involved was whether a woman had the right to vote in the State of Missouri under the Fourteenth Amendment to the Constitution of the United States, when the Constitution of Missouri provided that only male citizens of that State should have the right to vote.

While this case does not involve the question of the constitutional amendment for woman's suffrage, its lucid treatment by the Chief Justice of the questions involving the right of suffrage, its conditions, etc., may be read with profit by any student of this subject.

Chief Justice White delivered the opinion of the court, as follows:

"The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and

[1] 21 Wall. 162, 22 L. Ed. 627.

of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone. . . .

"It is contended that the provisions of the constitution and laws of the State of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the constitution of the United States and, therefore, void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or constitution abridge.

"There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment 'all persons born or naturalized in the United States and subject to the jurisdiction thereof' are expressly declared to be 'citizens of the United States and of the State wherein they reside.' But, in our opinion, it did not need this amendment to give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, yet there were necessarily

such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

"For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterward adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.

"To determine, then, who were citizens of the United States before the adoption of the amendment, it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

"Looking at the Constitution itself, we find that it was ordained and established by 'the people of the United States,'[1] and then going further back, we find that these were the people of the several States that had before dissolved the political bonds which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth,[2] and that had by Articles of Confederation and Perpetual Union, in which they took the name of 'the United States of America,' entered into a firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.[3]

"Whoever, then, was one of the people of either of these States when the Constitution of the United

[1] Preamble, 1 Stat. at Large, 10.
[2] Declaration of Independence, 1 Stat. at Large, 1.
[3] Articles of Confederation, Sec. 3, 1 Stat. at Large, 4.

States was adopted, became *ipso facto* a citizen — a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.

"Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides[1] that 'no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President,'[2] and that Congress shall have power 'to establish a uniform rule of naturalization.' Thus new citizens may be born or they may be created by naturalization.

"The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its

[1] Article 2, Sec. 1. [2] Article 1, Sec. 8.

citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words 'all children' are certainly as comprehensive, when used in this connection, as 'all persons,' and if females are included in the last they must be in the first. That they are included in the last is not denied. In fact, the whole argument of the plaintiff proceeds upon that idea.

"Under the power to adopt a uniform system of naturalization, Congress, as early as 1790, provided 'that any alien, being a free white person,' might be admitted as a citizen of the United States, and that the children of such persons so naturalized, dwelling within the United States, being under twenty-one years of age at the time of such naturalization, should also be considered citizens of the United States, and that the children of citizens of the United States that might be born beyond the sea, or out of

the limits of the United States, should be considered as natural-born citizens.[1] These provisions thus enacted have, in substance, been retained in all the naturalization laws adopted since. In 1855, however, the last provision was somewhat extended, and all persons theretofore born or thereafter to be born out of the limits of the jurisdiction of the United States, whose fathers were, or should be at the time of their birth, citizens of the United States, were declared to be citizens also.[2]

"As early as 1804 it was enacted by Congress that when any alien who had declared his intention to become a citizen in the manner provided by law died before he was actually naturalized, his widow and children should be considered as citizens of the United States, and entitled to all rights and privileges as such upon taking the necessary oath;[3] and in 1855 it was further provided that any woman who might lawfully be naturalized under the existing laws, married, or who should be married to a citizen of the United States, should be deemed and taken to be a citizen.[4]

"From this it is apparent that, from the commencement of the legislation upon this subject alien women and alien minors could be made citizens by

[1] 1 Stat. at Large, 103.
[2] 10 *Id.*, 604.
[3] 2 *Id.*, 292.
[4] 10 *Id.*, 604.

naturalization, and we think it will not be contended that this would have been done if it had not been supposed that native women and native minors were already citizens by birth.

"But if more is necessary to show that women have always been considered as citizens the same as men, abundant proof is to be found in the legislative and judicial history of the country. Thus, by the Constitution, the judicial power of the United States is made to extend to controversies between citizens of different States. Under this it has been uniformly held that the citizenship necessary to give the courts of the United States jurisdiction of a cause must be affirmatively shown on the record. Its existence as a fact may be put in issue and tried. If found not to exist, the case must be dismissed. Notwithstanding this the records of the courts are full of cases in which the jurisdiction depends upon the citizenship of women, and not one can be found, we think, in which objection was made on that account. Certainly none can be found in which it has been held that women could not sue or be sued in the courts of the United States. Again, at the time of the adoption of the Constitution, in many of the States (and in some probably now) aliens could not inherit or transmit inheritance. There are a multitude of cases to be found in which the

question has been presented whether a woman was or was not an alien, and as such capable or incapable of inheritance, but in no one has it been insisted that she was not a citizen because she was a woman. On the contrary, her right to citizenship has been in all cases assumed. The only question has been whether, in the particular case under consideration, she had availed herself of the right.

"In the legislative department of the government similar proof will be found. Thus, in the pre-emption laws,[1] a widow, 'being a citizen of the United States,' is allowed to make settlement on the public lands and purchase upon the terms specified, and women, 'being citizens of the United States,' are permitted to avail themselves of the benefit of the homestead law.[2]

"Other proof of like character might be found, but certainly more cannot be necessary to establish the fact that sex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs.

[1] 5 Stat. at Large, 455, Sec. 10.
[2] 12 *Id.*, 392.

Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The amendment prohibited the State, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption.

"If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

"The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

"It certainly is nowhere made so in express terms. *The United States has no voters in the States of its own creation.*[1] The elective officers of the United States are all elected directly or indirectly by state voters. The members of the House of Representatives are to be chosen by the people of the States, and the

[1] Author's italics.

electors in each State must have the qualifications requisite for electors of the most numerous branch of the State legislature.[1] Senators are to be chosen by the legislatures of the States, and necessarily the members of the legislature required to make the choice are elected by the voters of the State.[2] Each State must appoint in such manner as the legislature thereof may direct, the electors to elect the President and Vice-President.[3] The times, places, and manner of holding elections for Senators and representatives are to be prescribed in each State by the legislature thereof; but Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators.[4] It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the state laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts.

"The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily

[1] Constitution, Article 1, Sec. 2.
[2] *Id.*, Article 1, Sec. 3.
[3] *Id.*, Article 2, Sec. 2.
[4] *Id.*, Article 1, Sec. 4.

made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the States, but it operates for this purpose, if at all, through the States and the state laws, and not directly upon the citizen.

"It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged of citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

"When the Federal Constitution was adopted, all the States, with the exception of Rhode Island, had constitutions of their own. Rhode Island continued to act under its charter from the Crown. Upon an examination of those constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. Thus, in New Hampshire, 'every male inhabitant of each town and parish with town privileges, and places unincorporated in the

State, of twenty-one years of age and upwards, excepting paupers and persons excused from paying taxes at their own request,' were its voters; in Massachusetts 'every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the commonwealth of the annual income of three pounds or any estate of the value of sixty pounds'; in Rhode Island 'such as are admitted free of the company and society' of the Colony; in Connecticut such persons as had 'maturity in years, quiet and peaceable behavior, a civil conversation, and forty shillings freehold or forty pounds personal estate,' if so certified by the selectmen; in New York 'every male inhabitant of full age who shall have personally resided within one of the counties of the State for six months immediately preceding the day of election . . . if during the time aforesaid he shall have been a freeholder possessing a freehold of the value of twenty pounds within the county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the State'; in New Jersey 'all inhabitants . . . of full age who are worth fifty pounds, proclamation-money, clear estate in the same, and have resided in the county in which they claim a vote for twelve months immediately preceding the election'; in Pennsylvania 'every freeman of

the age of twenty-one years, having resided in the State two years next before the election, and within that time paid a State or county tax which shall have been assessed at least six months before the election'; in Delaware and Virginia 'as exercised by law at present'; in Maryland 'all freemen above twenty-one years of age having a freehold of fifty acres of land in the county in which they offer to vote and residing therein, and all freemen having property in the State above the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election'; in North Carolina, for Senators, 'all freemen of the age of twenty-one years who have been inhabitants of any one county within the State twelve months immediately preceding the day of election, and possessed of a freehold within the same county of fifty acres of land for six months next before and at the day of election,' and for members of the House of Commons 'all freemen of the age of twenty-one years who have been inhabitants in any one county within the State twelve months immediately preceding the day of any election, and shall have paid public taxes'; in South Carolina 'every free white man of the age of twenty-one years, being a citizen of the State and having resided therein two years previous to the day of election, and who hath

a freehold of fifty acres of land, or a town lot of which he hath been legally seized and possessed at least six months before such election, or (not having such freehold or town lot), hath been a resident within the election district in which he offers to give his vote six months before said election, and hath paid a tax the preceding year of three shillings sterling towards the support of the government'; and in Georgia such 'citizens and inhabitants of the State as shall have attained to the age of twenty-one years, and shall have paid tax for the year next preceding the election, and shall have resided six months within the county.'

"In this condition of the law in respect to suffrage in the several States, it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

"But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By Article 4, Section 2, it is provided that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' If suffrage

is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the State and thus be voters. It goes to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think, has never been claimed. And again, by the very terms of the amendment we have been considering (the fourteenth), 'Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in the rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.' Why this, if it was not in the power of the legislature to deny

the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, 'persons.' They are counted in the enumeration upon which the apportionment is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated if suffrage was the absolute right of all citizens.

"And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of the citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, etc? Nothing is more evident than that the greater must include the less, and if all were

already protected why go through with the form of amending the Constitution to protect a part?

"It is true that the United States guarantees to every State a republican form of government.[1] It is also true that no State can pass a bill of attainder,[2] and that no person can be deprived of life, liberty, or property without due process of law.[3] All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances.

"The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

"The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it

[1] Constitution, Article 4, Sec. 4.
[2] *Id.*, Article 1, Sec. 10. [3] *Id.*, Amendment 5.

is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

"As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

"The same may be said of the other provisions just quoted. Women were excluded from suffrage in nearly all the States by the express provision of their Constitutions and laws. If that had been equivalent to a bill of attainder, certainly its abrogation would not have been left to implication. Nothing less than express language would have been employed to effect so radical a change. So, also, of the amendment which declares that no person shall be deprived of life, liberty, or property without due process of law, adopted as it was as early as 1791. If suffrage was intended to be included within its obligations, language better adapted to express that intent would most certainly have been employed.

The right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, but in order to claim protection he must first show that he has the right.

"But we have already sufficiently considered the proof found upon the inside of the constitution. That upon the outside is equally effective.

"The Constitution was submitted to the States for adoption in 1787, and was ratified by nine States in 1788, and finally by the thirteen original States in 1790. Vermont was the first new State admitted to the Union, and it came in under a constitution which conferred the right of suffrage only upon men of the full age of twenty-one years, having resided in the State for the space of one whole year next before the election, and who were of quiet and peaceable behavior. This was in 1791. The next year, 1792, Kentucky followed with a constitution confining the right of suffrage to free male citizens of the age of twenty-one years who had resided in the State two years or in the county in which they offered to vote one year next before the election. Then followed Tennessee, in 1796, with voters of freemen of the age of twenty-one years and upwards, possessing a freehold in the county wherein they may vote, and being inhabitants of the State or freemen being inhabitants of any one county in the State six months

immediately preceding the day of election. But we need not particularize further. No new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission. On the contrary, as is claimed in the argument, the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey, without any attempt to obtain the interference of the United States to prevent it. Since then the governments of the insurgent States have been reorganized under a requirement that before their representatives could be admitted to seats in Congress they must have adopted new constitutions, republican in form. In no one of these constitutions was suffrage conferred upon women, and yet the States have all been restored to their original position as States in the Union.

"Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.

"Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States professedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

"We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.

"Being unanimously of the opinion that the constitution of the United States does not confer the right of suffrage upon any one, and that the

constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we

"Affirm the judgment." [1]

[1] See also *U. S.* v. *Anthony*, 11 Blatchford, 205.

ERRATUM

Page 178, line fourteen; for "White" read "Waite."

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